The RT Review

The Latest on Environmental Issues From Your Solution-Oriented Environmental Services Firm

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PUBLIC OFFICIALS HAVE CERTAIN DUTIES TO PRIVATE SECTOR EMPLOYEES WORKING AT PUBLIC FACILITIES

An ABC cameraman fell to this death at Camp Randall Stadium in Wisconsin. Barry Fox, Director of Facilities for the stadium, was found not to be subject to immunity normally granted to public employees for safety liability because guardrails should have been installed. [The Occupational Safety and Health Act (OSHA) requires guardrails in this situation.] Initial decisions in the case of Umansky v. ABC Ins. Co., 209 WI 82 were appealed but a key argument was that public and private workers should not be treated differently.

The Justices said that Fox's lawyer's legal arguments on the status of individual workers (public or private) rather than the safety of a workplace is "unworkable." The court said it is a "peculiar conclusion" that "the [Wisconsin] statute's stated purpose of protecting public employees somehow justifies allowing the breach of a ministerial duty with impunity, so long as the person injured or killed happens not to be a public employee."

In a concurring opinion, Justice N. Patrick Crooks remarked that the Legislature, when it passed [Wisconsin] statutes on public workplace safety, gave no indication that it intended to create disparate treatment for similarly situated persons. The Legislature "adopted the measure extending OSHA safety regulations to 'all public buildings,'" Crooks noted. "A public building that is safe for public employees must be safe for everyone, including employees of a private firm," he wrote.

The findings in the case have major implications to those managing public facilities.

There are OSHA requirements for:
-Hazardous Materials Management and Workplace Safety
-Asbestos Containing Materials Management
-Air Quality Impacts from Hazardous Materials and Hazardous Substance Use

RT recommends that public facilities conduct audits in the near future to determine if their Environmental and Health and Safety Programs are the type that can meet OSHA requirements. There is now a new duty to protect private sector employees working in public buildings and spaces, so there is a newly established level playing field for Facilities and Building Managers in public facilities.

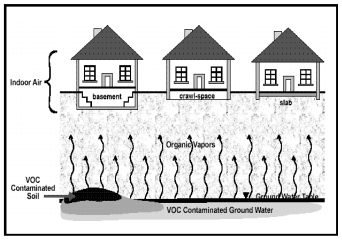
RT has conducted audits of public and private buildings in the United States and Caribbean. For more information call Larry Bily at 610-265-1510 Ext. 236.

NEW SAMPLING CONCERNS UNVEILED

EPA DELAYS ISSUANCE OF FINAL VAPOR INTRUSION GUIDANCE UNTIL FALL OF 2012: EPA OIG SAYS TIME TO FINALIZE

- By Walter Hungarter

The EPA issued the Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils (Subsurface Vapor Intrusion Guidance) in November 2002 as a replacement to a 2001 draft RCRA vapor instruction guidance document. The goal of the 2002 guidance document was to provide a tool for evaluating potential exposure pathways and to determine if a vapor intrusion pathway would cause an unacceptable risk to human health. EPA indicated that vapor intrusion is a rapidly developing field of science and policy; as such they have been completing ongoing research since the issuance of the draft guidance. One such example is a study released by EPA in September 2009 which shows that air sampling for toxic vapor risks near a building's foundation may inaccurately represent the vapor intrusion risk to indoor air, a result that raises doubts about less-invasive monitoring techniques and that the Agency says will be incorporated into the guidance document.



Completed by EPA contractors in August, the study will be incorporated into forthcoming EPA guidelines detailing vapor intrusion monitoring requirements and could even be applied retroactively to completed or ongoing site assessments if they rely on near-slab soil gas monitoring instead of sub-slab monitoring, according to Brian Schumacher, an EPA staff scientist who conducted the study. The study was completed at a site with known trichloroethylene (TCE) contamination and found that the samples taken within a few feet of the slab underestimated the concentration of TCE in the air as compared to the samples taken from under the slab, meaning that air samples taken from outside a building may not be as accurate as more intrusive sampling methods, such as sampling underneath or through the slab itself.

Although the science and policy related to vapor intrusion is rapidly changing, frustration is occurring throughout the regulated community as indicated by the US EPA Office of Inspector General (OIG).

The OIG issued a report on December 14, 2009 titled *Lack of Final Guidance on Vapor Intrusion Impedes Efforts to Address Indoor Air Risks*. The report from the OIG concluded that:

-EPA's efforts to protect human health at sites where vapor intrusion risks may occur have been impeded by the lack of final Agency guidance on vapor intrusion risks. EPA's 2002 draft vapor intrusion guidance has limited purpose and scope, and the science and technology associated with evaluating and addressing risk from vapor intrusion is evolving. EPA's draft also contains outdated toxicity values for assessing risk to humans from chemical vapors in indoor air.

-EPA's draft guidance does not address mitigating vapor intrusion risks or monitoring the effectiveness of mitigation efforts. The draft guidance also does not clearly recommend that multiple lines of evidence be used in evaluating and making decisions about risks from vapor intrusion. The draft guidance is not recommended for assessing vapor intrusion risks associated with petroleum releases at Underground Storage Tank

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RT STAFF AND PROJECT NEWS

Late fall and early winter business trends were showing significant increases in environmental work for RT. Leading off the pack are a series of Phase I Environmental Site Assessments assignment out of RT's Southwest Pennsylvania office for a regional bank. In addition, Greene County retained RT Environmental Services, Inc. to assist with reclamation of a gob pile, including evaluation of reclamation alternatives to address acid mine discharge. Justin Lauterbach is Manager of RT's Southwest Regional office in Washington, Pennsylvania, a short distance southwest of Pittsburgh, located in a growing area where I-70 and I-79 meet. RT is expecting to add staff in this office per our 2010 Business Plan.

Gloucester City's Southport Redevelopment project, featured as a lead article in a previous RT Review is ramping up with several additional phases of activity. In addition to one site undergoing remediation prior to redevelopment for a fruit importation and warehousing facility along the port, two other sites are being evaluated for solar energy production. Glenn Graham is managing the project for RT, and William Lindner of NJDEP is the Case Manager.

Walter Hungarter and Larry Bily of RT's King of Prussia's office are working on several Pennsylvania beneficial use projects, one involving materials from a source separated recyclables, facility and another involving materials that can be reused from semiconductor products manufacturing. Recovery of precious metals from these materials allows for maximum recycling and beneficial use, throughout a wide area of the United States.

Lisa Mascara of our Southwest Pennsylvania office has been ramping up marketing and sales opportunities, to allow us to meet efficiently with each and every potential client. We try to make our marketing and sales opportunities very focused, and to be able to offer services which will be of specific value to our potential clients. Lisa has shown that in-depth preparation and knowledge of commercial, lender, and industrial clients and understanding their needs allows our business meetings to be focused and beneficial. Lisa also keeps track of Southwest Pennsylvania regional events and government needs to help us be there for future growth and environmental service opportunities.

Gary Brown received his Licensed Site Remediation Professional temporary licensing, for the State of New Jersey. Burling Vannote has accepted responsibilities to track LSRP projects, in terms of deliverables, and regulatory and mandatory compliance dates. RT already has five LSRP projects in house, including one Imminent Environmental Condition project.

RT's business trends are clearly up early in 2010, and we look forward to being of service to our clients this year and beyond.

- Gary R. Brown

GLENN GRAHAM IS RT'S NEW JERSEY OFFICE MANAGER

Gary R. Brown, P.E., President of RT, announced that Glenn Graham has accepted responsibility as RT's New Jersey Office Manager. Glenn has a Bachelor of Arts in Geology from LaSalle University, and is a Professional Geologist in Pennsylvania and a Subsurface Evaluator in New Jersey. Glenn has in-depth experience at New Jersey investigation and remediation sites, and is managing the Gloucester City Southport Redevelopment project, and is the lead Geologist on the Bellmawr Waterfront Development project.

Glenn's in-depth geologic experience works really well, in New Jersey and Southeast Pennsylvania. He has extensive project experience over 15 years in Pennsylvania, New Jersey and downstate New York, and has project experience on investigation and remediation sites in sedimentary, coastal plain and piedmont/rock environments, allows him to concept and implement site investigations very efficiently. Glenn has received increased responsibilities and has undertaken more complex assignments every year since he started with RT, and we can congratulate him on his promotion.

EPA DELAYS ISSUANCE OF FINAL VAPOR INTRUSION GUIDANCE UNTIL FALL OF 2012: EPA OIG SAYS TIME TO FINALIZE

Continued from page 1)

sites. EPA's outdated toxicity values allow for the use of widely different, nonfederal toxicity values and have caused delays in work to address possible risks.

-EPA has not finalized its guidance, according to EPA managers and staff, because the 2007 Interstate Technology Regulatory Council guidance addressed many issues that EPA would have addressed in a final guidance, and because finalizing EPA's guidance would take a long time in light of the emerging scientific issues in the field. Also, previous administrative review requirements for Agency guidance were perceived as barriers to issuing timely guidance in a rapidly changing environment. These requirements were revoked by the current Administration, but significant guidance remains subject to some administrative review.

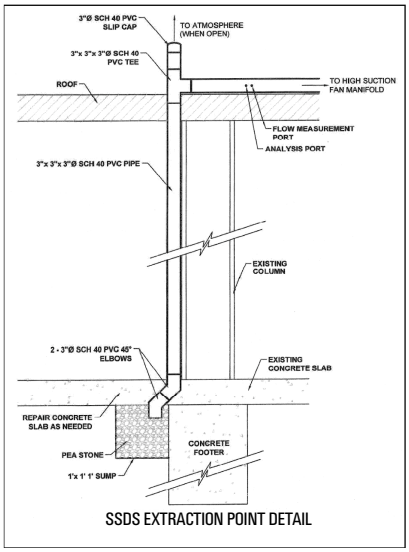
-Seven years later, EPA is developing a roadmap of technical documents that will update its draft guidance. However, technical documents may not be effective for conveying and representing Agency policy. EPA has also made some progress in updating toxicity values for some contaminants most frequently associated with vapor intrusion.

-The OIG recommended that EPA issue final guidance to establish current Agency policy on the evaluation and mitigation of vapor intrusion risks. The Agency should also finalize toxicity values for trichloroethylene and perchloroethylene – common contaminants associated with vapor intrusion.

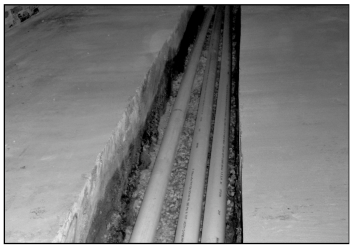
Delays by EPA, however, have not slowed down the development of State-lead vapor intrusion guidance documents and/or policy, as it is reported that a least 26 States have developed their own guidance document/policy. The drawback to this, however, is that there is inconsistency from State to State and large variations in the toxicity values used for determining risk leading to reliance on values which may not be universally viewed as protective. Additionally, ASTM International is working on a vapor intrusion guidance document which is expected to be voted on by its members in 2010.

Suction cavity with HDPE piping

In the past several years, there has been an increase in the number of projects at RT which are requiring the evaluation of the vapor intrusion pathway and an increase in the number of remediation systems (passive and/or active) being installed at sites. Sub-slab depressurization systems utilizing radon type mitigation fans have been installed at several sites and are planned for at least one other site in the coming month. Retrofit projects are also becoming a hot topic as State Agencies evaluate and update guidance and more Brownfield sites are redeveloped. We've recently worked on a New Jersey dry-cleaning site where their was historic soil impacts beneath the slab which required the installation of an active sub-slab venting system in an existing building to control vapor impacts to adjacent tenant spaces. Larger retrofit projects can be needed on some projects where large extraction trenches are needed to effectively control vapor intrusion from beneath the slab, similar to a project RT completed in Maryland.



SSDS EXTRACTION POINT DETAIL



Vapor Extraction Trench and Piping

HDPE Vapor Barrier

Additionally, passive remedial sub-slab venting systems have been installed at many sites which include installation of venting piping and a plastic (PVC or HDPE) vapor barrier (some similar to a landfill lining system) beneath the floor slab prior to construction. Passive venting systems are not connected to fans and only prevent vapors from accumulating beneath the slab of a building. Passive venting and vapor barrier systems are typically used as a means of pathway elimination thereby reducing risk to occupants of the building.

PVC Vapor Barrier

Until EPA finalizes the draft guidance for evaluating the vapor intrusion at sites, the regulated community will be forced continue to use the readily available State developed guidance as a basis for making decisions related to evaluation and remediation of vapor intrusion issues. RT will continue to monitor the developments in the EPA guidance and keep its clients informed as the Agency moves toward finalization of the guidance. Should you have further questions related to evaluating and/or remediating vapor intrusion, please contact RT and ask for Walter H. Hungarter, III or Gary R. Brown, P.E.

Sources:

Environmental Reporter Volume 40, Number 50; December 14, 2009

US EPA – At a Glance; December 14, 2009

SUPERFUND REPORT; September 21, 2009

Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils (Subsurface Vapor Intrusion Guidance); November 2002

EPA530-F-02-052; November 2002

FEDERAL REGULATORY UPDATES

RCRA CLEANUP OBLIGATION NOT DISCHARGEABLE IN BANKRUPTCY

The U.S. Court of Appeals for the Seventh Circuit recently affirmed a federal district court decision holding that a cleanup obligation imposed pursuant to the Resource Conservation and Recovery Act ("RCRA") against Apex Oil Company ("Apex") was not discharged by the Chapter 11 bankruptcy of Apex's corporate predecessor.

The main issue addressed in U.S. v. Apex Oil Co., was whether an injunction issued by the U.S. Environmental Protection Agency ("EPA"), requiring Apex to cleanup contamination at a former Hartford, Illinois refinery, constituted a "claim" under section 101(5) of the Bankruptcy Code, and was thus dischargeable in bankruptcy. Apex argued that, based on the Bankruptcy Code's definition of "claim," the injunction was a "right to payment" because it would require Apex to expend approximately $150 million to comply, and was therefore properly discharged by the bankruptcy proceedings of its corporate predecessor. The Seventh Circuit disagreed and concluded that a RCRA injunction is equitable in nature because it does not allow the government to seek payment in lieu of performance, irrespective of Apex's cost to comply. Accordingly, the cleanup obligation imposed by the injunction was not discharged and Apex must now comply.

The decision is significant because it undermines the overarching "fresh start" policy of the Bankruptcy Code, particularly at a time when companies are increasingly looking to bankruptcy to shed some of its debt in the hopes of surviving these difficult economic times. Those companies faced with potential RCRA liability and considering Chapter 11 reorganization will now need to evaluate whether bankruptcy is a viable option in light of this opinion.

(by Angela Pappas, Manko, Gold, Katcher & Fox, Client Alert – 12/09)

POWER PLANTS FACE POTENTIALLY COSTLY NEW AIR-POLLUTION RULES

The Environmental Protection Agency has agreed to issue new air-pollution rules for coal- and oil-fired power plants by November 2011, according to court documents.

While the new regulations will likely reduce emissions of cancer-causing pollutants by millions of tons annually, they could mean costly technology upgrades for the industry.

A consent decree released follows a lawsuit filed by medical associations and environmental o rganizations against the EPA in December, alleging the agency wasn't drafting new power-plant emission rules fast enough as required by the Clean Air Act.

At issue were final "maximum achievable control technology" emission standards for hazardous air pollutants such as mercury, arsenic, cadmium, other heavy metals, acid gases and dioxins. The agreement marks a major victory for the medical and environmental groups after years of legal battles against the industry and the Bush administration EPA.

"This is big," said Ann Weeks, legal director at the Clean Air Task Force, who has been fighting for new standards for nearly a decade. "We are very pleased with the outcome of this case, and look forward to working with the EPA to develop emissions standards for this industry that mandate the deep cuts in this pollution that the law requires."

The EPA said addressing hazardous pollutants emitted by utilities is a high priority. "the agency is committed to developing a strategy to reduce harmful emissions from these facilities, which threaten the air we all breathe," the agency said. it plans to propose standards for oil and coal-fired generation by march 2011.

At American Electric Power Co., one of the nation's largest operators of coal-fired power plants, spokesman Pat Hemlepp said the company was concerned the EPA won't have time to fully review emissions and develop a sound technical basis for its rule.

Dan Riedinger, a spokesman for the Edison Electric Institute, the industry's trade association, called the schedule "a pretty aggressive timeline for a new rule," and expressed concern that the agency "may not be able to get the quality data it wants and needs" before it must act. The EPA earlier this year sought public comment on how to collect pollution data that would provide the basis for new emission regulations.

Mr. Riedinger said it is too early to estimate potential costs to the industry.

(By Ian Talley, Wall Street Journal – 10/24/09)

ASTM WARNING ON COAL ASH REUSE STYMIES STALLED EPA BID FOR STRICT RULE

ASTM International, the private standard-setting organization, is warning that EPA's stalled plans to regulate some coal ash as "hazardous" would prompt the group to drop its specification allowing for ash to be used as a key component in concrete due to potential liability and public perception concerns -- eliminating a key driver for the beneficial reuse of the material.

The group's warning -- sent on the anniversary of a massive coal ash spill that first prompted EPA's regulatory effort under the Resource Conservation & Recovery Act (RCRA) -- could be persuasive in driving home industry and other critics' efforts to kill EPA plans to regulate some forms of the ash as hazardous, in part because they claim it would undermine beneficial reuse of the materials.

EPA plans for a hazardous waste RCRA designation, even with an exclusion for beneficial use, "would cause the ASTM standard to be removed from project specifications due to concerns over legal exposure, product liability and public perception. This will likely result in little or no fly ash being used beneficially in concrete or other applications that support sustainability objectives," the group says in a Dec. 22 letter to EPA Administrator Lisa Jackson.

Industry sources say the letter could be especially helpful to their efforts because White House regulatory review officials may have already called on EPA to redo its initial analysis that found no impact of a hazardous designation on beneficial reuse. The ASTM letter could also be helpful because the agency declined a request from "reuse" industries to conduct a small business impact review of the regulation, the sources say. "What everybody was hearing was EPA's economic analysis accounted for a zero effect on the beneficial reuse industry and now it may be that OMB convinced them they have to go back and analyze the effects on beneficial use," one source says, citing a potential reason for EPA's December 17 announcement that it would delay its proposal.

Another industry source notes that ASTM does not usually take such stances, but says the letter is "powerful" and would have the "effect of driving fly ash use" in concrete to "zero."

The letter may also intensify pressure on EPA to drop its preferred hybrid approach regulating coal waste as hazardous when it is disposed in a landfill but as nonhazardous when beneficially reused, such as in concrete. The first industry source says the agency is being pushed to offer a menu of options without articulating a preference but that until now agency officials have been resisting.

An EPA spokeswoman would not comment directly on the ASTM letter because the agency is still in the midst of a rulemaking but she reiterated EPA's commitment to develop a rule that protects human health and the environment.

(SUPERFUND – 12/28/09)

AFTER YEARS-LONG REVIEW, EPA APPEARS READY TO TIGHTEN TCE RISK LEVELS

After years of scientific review and debate, EPA's just-released draft study of the risks posed by the ubiquitous solvent trichloroethylene (TCE) appears to strengthen the non-cancer safety limits -- while generally backing the cancer risk limits -- that the agency first proposed in a controversial 2001 draft.

Once finalized, the risk assessment will likely form the basis for setting strict cleanup levels at scores of contaminated sites and drinking water aquifers across the country, and help to bring consistency to the different state approaches that have been developed as regulators awaited a final decision from EPA.

Even the Pentagon -- which faces significant cleanup liability for the contaminant and had raised concerns about the regulatory impacts of EPA's 2001 draft -- appears to be on board with EPA's new approach.

TCE has been a contaminant of concern at many existing and former military sites due to its former widespread use as an industrial degreaser. It is frequently detected in groundwater, where it can contaminate drinking water supplies and

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FEDERAL REGULATORY UPDATES *(Continued)*

migrate into indoor air as toxic vapor.

In a new draft risk assessment released Nov. 3, EPA proposed safe daily oral and inhalation levels to address the chemical's non-cancer risks, as well as cancer potency factors for inhalation and oral exposure.

For non-cancer risks, the agency calculated a reference concentration (RfC), or safe exposure level from inhalation, of 5 micrograms per cubic meter of air (ug/m3), eight times stronger than the 2001 RfC of 40 ug/m3.

The new assessment also calculated a reference dose (RfD), or safe oral exposure level of 0.0004 milligrams per kilogram body weight per day (mg/kg-day), weaker than the earlier oral non-cancer levels. Previously, EPA calculated RfDs of 0.0002 mg/kg-day and 0.0003, depending on the uncertainty factors used to calculate the risk level. The agency uses uncertainty factors to address areas of uncertainty in its data and risk assessment processes, intended to provide a more conservative standard to protect individuals or groups who may be more sensitive to exposure to the chemical.

The new cancer slope factor, however, falls squarely within the range that EPA previously calculated. EPA's new assessment includes an oral cancer slope factor, or estimate of cancer potency, of 0.0463 mg/kg-day. The agency had previously calculated a range of oral cancer risk values, from 0.02 to 0.4 mg/kg-day.

The new version also includes an inhalation unit risk estimate of 4x10-6, a level not calculated in the earlier assessment.

EPA is moving to finalize the revised assessment and regulators will be able to begin setting strict regulatory levels. One of the first may be an EPA guidance for cleaning up TCE contamination that results in indoor vapor contamination.

(SUPERFUND REPORT – 11/16/09)

FINAL EFFLUENT GUIDELINES - CONSTRUCTION SITES

On November 23, 2009, the U.S. Environmental Protection Agency (EPA) published effluent limitations guidelines (ELGs) and new source performance standards (NSPS) to control the discharge of pollutants from construction sites. This rule requires construction site owners and operators to implement a range of erosion and sediment control measures and pollution prevention practices to control pollutants in discharges from construction sites.

Testing of runoff from construction sites will also be required starting in 2011. Go to www.epa.gov/waterscience/guide/consruction/ for more information.

To get a copy of the recent RT Email Blast on these rules, go to:
www.rtenv.com/email_blast_archive.html.

EPA PROPOSES STRONGER NATIONAL AMBIENT AIR QUALITY STANDARDS FOR SULFUR DIOXIDE

For the first time in nearly 40 years, EPA is proposing to strengthen the nation's sulfur dioxide (SO2) air quality standard to protect public health. Power plants and other industrial facilities emit SO2 directly into the air. Exposure to SO2 can aggravate asthma, cause respiratory difficulties, and result in emergency room visits and hospitalization. People with asthma, children, and the elderly are especially vulnerable to SO2's effects.

"Short-term exposures to peak SO2 levels can have significant health effects—especially for children and the elderly—and leave our families and taxpayers saddled with high health care costs," said EPA Administrator Lisa P. Jackson. "We're strengthening clean air standards, stepping up monitoring and reporting in communities most in need, and providing the American people with protections they rightly deserve."

EPA is taking comments on a proposal to establish a new national one-hour SO2 standard, between 50 and 100 ppb. This standard is designed to protect against short-term exposures ranging from five minutes to 24 hours. Because the revised standards would be more protective, EPA is proposing to revoke the current 24-hour and annual SO2 health standards.

EPA also is proposing changes to monitoring and reporting requirements for SO2. Monitors would be placed in areas with high SO2 emission levels as well as in urban areas. The proposal also would change the Air Quality Index to reflect the revised SO2 standards. This change would improve states' ability to alert the public when short-term SO2 levels may affect their health.

The proposal addresses only the SO2 primary standards, which are designed to protect public health. EPA will address the secondary standard—designed to protect the public welfare, including the environment—as part of a separate proposal in 2011.

EPA first set National Ambient Air Quality Standards for SO2 in 1971, establishing both a primary standard to protect health and a secondary standard to protect the public welfare. Annual average SO2 concentrations have decreased by more than 71% since 1980.

(Env. Resource Center – 11/23/09)

ACTIVISTS SEEK EQUITY AS KEY FACTOR IN AGENCY MINING PERMIT REVIEWS

Environmentalists are asking EPA to ensure that environmental justice be a key factor in the agency's ongoing review of mountaintop mining permits in order to shift the debate from mining's impacts on aquatic life to the impact on the rural poor, in line with the Obama EPA's vowed focus on ensuring environmental justice.

By including environmental justice -- a top priority for EPA Administrator Lisa Jackson -- as a factor, activists hope to highlight the practice's negative impact on poor people. That could boost public opposition to the practice and aid their fight to block mining permits. That could also help overcome industry's claim that environmentalists are only interested in protecting aquatic life at the expense of shutting down the mining industry, sources say.

Nevertheless, the National Mining Association (NMA) in a statement condemns the petition and says that mining acts as an "economic engine" to the benefit of the poor communities at issue.

The Sierra Club and other activist groups filed an Oct. 5 petition with EPA, claiming the environmental effects of mountaintop mining are disproportionately impacting the rural poor in Appalachia. They want EPA to incorporate environmental justice considerations into its review of Clean Water Act (CWA) mountaintop mining permits, including performing research on the practices' impacts on human health and the environment.

EPA has preliminarily found that all 79 mountaintop mine permits that agency officials have been reviewing may violate the CWA, announcing that heightened scrutiny and stronger control and mitigation provisions will likely be necessary before the permits can move forward (Superfund Report, Sept. 21). Environmentalists are now pushing to have equity be an additional factor for the agency to weigh before making a final determination.

"We urge EPA to address its responsibility to protect the low income communities of Appalachia and to use its authorities now because, after decades of economic exploitation by out-of-state corporate interests, our communities remain low-income with high poverty levels and are rapidly losing natural resources," the petition says.

The group asks EPA to define the Appalachian Mountain region of southern West Virginia, southwest Virginia, eastern Kentucky and eastern Tennessee as an environmental justice community due to their vulnerability to the ongoing risks from mountaintop mining.

In mountaintop mining, operators blast the tops off of mountains with heavy explosives to get at coal seams underneath. The practice has prompted broad concern from activists and others because the waste rock is then "discharged" in valley fills using CWA section 404 permits, obliterating streams and harming water quality. Communities surrounding valley fills have also faced property damage due to the practice.

The petition says that EPA must address the Appalachian states an "an environmental justice area of concern" in the ongoing permit reviews, as required by Executive Order 12898. That order generally requires agencies to consider environmental justice issues in their decision-making processes.

Environmentalists claim that to date EPA has not followed the order in addressing the impacts of mountaintop mining on environmental justice communities. They want the agency to: create an environmental justice plan for the region to address the practice's impacts on poor, rural communities; incorporate environmental justice considerations into the agency's ongoing CWA review of the 79 mountaintop mining permits; establish greater opportunities for public involvement regarding mountaintop mining; and take several other steps.

(SUPERFUND REPORT – 10/19/09)

EPA PROMOTES FLEXIBLE AIR PERMITTING

EPA has revised the regulations governing State and Federal operating permit programs required by Title V of the Clean Air Act (CAA).

FEDERAL REGULATORY UPDATES *(Continued)*

The final rule, published in the October 6, 2009, Federal Register, promotes flexible air permitting (FAP) approaches that provide greater operational flexibility and, at the same time, ensure environmental protection and compliance with applicable laws.

The revisions to the Title V regulations consist of adding definitions for alternative operating scenario (AOS) and approved replicable methodology (ARM), and codifying some clarifications to existing provisions. These revisions are intended to clarify and reaffirm opportunities for accessing operational flexibility under existing regulations. EPA is not finalizing any revisions to the existing minor or major New Source Review (NSR) regulations. In particular, EPA is withdrawing the portion of the proposed rule which relates to Green Groups and their potential inclusion in NSR programs required by parts C and D of Title I of the CAA. Instead, EPA is encouraging States and others to investigate flexibilities currently available under the major NSR regulations.

The final rule was effective on November 5, 2009.

(Env. Resource Center – 10/12/09)

"FUNDAMENTAL CHANGES" EXPECTED FOR CERCLA SETTLEMENT NEGOTIATIONS

The United States has just announced a number of significant changes to the way that it intends to negotiate Remedial Design/Remedial Action ("RD/RA") Consent Decree under CERCLA. These changes likely will lead to more rapid and less flexible negotiations, with an increased focus on governmental enforcement if negotiations begin to lag. These changes will be implemented through a revised Model RD/RA Consent Decree and a new EPA policy document that is designed to tighten the time it takes to negotiate these documents.

In October, the Department of Justice ("DOJ") issued a revision to its Model RD/RA Consent Decree (replacing the 2001 version). This document incorporates many of the changes that have been made through prior piecemeal revisions and/or through practice since the 2001 version was issued. It also includes many changes that are designed to "improve and clarify" standard provisions in the previous Model, including those related to financial assurance guarantees, long-term O&M of groundwater treatment remedies, the breadth and timing of covenants, etc. The Model also – for the first time – includes optional provisions relating to federal PRP settlors if they are included in the RD/RA negotiations. In light of the substantial number of changes made, DOJ has prepared a redline reflecting the revisions and a chart summarizing the key modifications. See link below.

EPA also issued a new interim Policy on negotiating RD/RA Consent Decrees that it characterizes as "a new way of doing business." This Policy is designed to strengthen and shorten EPA's negotiation practices so as to achieve more timely settlements. This policy shift was prompted largely by the increasing delays between the issuance of a Special Notice Letter and a finalized Consent Decree. In the end, this new Policy likely will lead to a quickening of the pace of RD/RA negotiations and an increased use of alternative enforcement tools if those negotiations bog down. For more information, go to:
www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-rdra-2009-mem.pdf
/www.epa.gov/compliance/resources/policies/cleanup/superfund/rdra-neg-timeline-mem.pdf

If you have any questions regarding the United States' revised Model Consent Decree or EPA's new negotiation Policy, please contact Lindsay P. Howard of Babst Calland at (412) 394-5444 or you can contact (412) 394-5400.

(Babst Calland, Administrative Watch – 10/09)

MANDATORY REPORTING UNDERWAY FOR GREENHOUSE GAS EMISSIONS

EPA issued a final rule in September 2009 requiring mandatory reporting of greenhouse gas (GHG) emissions. This rule is the Obama administration's first major regulatory action on GHGs. The GHG reporting rule, which was Congressionally-mandated in an appropriations bill signed by President Bush in late 2007, requires most sources to submit their first annual GHG emission report on March 31, 2011, covering emissions for the calendar year beginning January 1, 2010. EPA estimates that the rule will cover 85% of total U.S. GHG emissions from approximately 10,000 facilities, and is expected to cost, in total, for all covered private sector facilities, approximately $115 million the first reporting year and $72 million each subsequent year.

Covered Sources and GHGs

The threshold emissions level for covered facilities is 25,000 metric tons of carbon dioxide equivalent ("CO2e") per year – and tere are 31 covered source categories in the final rule. In general, fossil fuel suppliers, industrial gas suppliers, manufacturers of engines and vehicles (except those from the light duty sector), and other downstream facilities that emit at least 25,000 metric tons of CO2e annually are covered under the final rule. The following source categories, which were included under the proposed rule, are not required to report emissions under the final rule:

-Oil and natural gas systems
-Electronics manufacturers
-Ethanol producers
-Coal suppliers and underground coal mines
-Wastewater treatment facilities
-Industrial landfills
-Food processors
-Fluorinated GHG producers and magnesium producers
-Sulfur hexafluoride emissions from electrical equipment
-Research and development ("R&D") activities

Another key provision in the final rule, not included in the proposed rule, allows facilities to cease reporting if their emissions fall below the threshold for a specified period of time. Specifically, covered facilities and suppliers may:

-cease reporting after emissions have fallen below 25,000 metric tons CO2e per year for five consecutive years;
-cease reporting after emissions have fallen below 15,000 metric tons CO2e per year for three consecutive years; or
-cease reporting if GHG-emitting processes or operations are shut down.

As in the proposed rule, the GHGs covered by the proposed rule are: carbon dioxide (CO2); methane (CH4); sulfur hexafluoride (SF6); nitrous oxide (N2O); perfluorocarbons (PFC); hydrofluorocarbons (HFC); and other fluorinated gases, including nitrogen trifluoride (NF3) and hydrofluorinated ethers (HFE). All GHGs will be measured and reported in CO2e, based on a conversion table supplied in Table A-1 of the final rule.

Reporting Methodology for Stationary Sources

The reporting methodology for stationary sources varies depending upon the industry sector, but generally, reporting will be from the facility, rather than the corporate, level. Certain suppliers of industrial GHGs and fossil fuels, as well as vehicle and engine manufacturers, will report at the corporate level. Facilities already required to report and collect data regarding one or more GHG, such as those facilities regulated under the Clean Air Act Acid Rain Program, will report GHG emissions based on direct measurements of emissions from each facility. Facility-specific calculation methods will be used for other sources. The proposed rule provides those calculation methods by industry sector, with sectors defined by their NAICS code, starting at Subpart C § 98.30.

In response to objections from industry representatives, who had argued that regulated sources would not have sufficient time to install all the required data-collection devices and properly train personnel, the final rule now allows emission estimation for a limited time period. Specifically, during the first quarter (January through March) of 2010, covered entities can collect emissions data based on best available monitoring methods, rather than by using the otherwise-required data collection techniques.

Reporting Threshold Calculation for Stationary Sources

Unless otherwise addressed, any stationary facility that meets the annual emissions threshold of 25,000 tons of CO2e, in total, must report all GHGs for which there are methods to measure data. A facility may develop capacity-based thresholds, if feasible. Those facilities in the Acid Rain Program, typically electricity generators and oil refineries, are expected to use capacity-based thresholds. Some facilities will have no threshold or thresholds different from 25,000 tons of CO2e. The threshold applicable to each source category is provided in the section of the proposed rule entitled "§ 98.2 Who must report?". EPA also provides tables summarizing the threshold triggers in its Fact Sheet for the proposed rule's General Provisions, available at: http://www.epa.gov/climatechange/emissions/downloads09/generalprovisions.pdf.

Reporting will be once a year, except that facilities already required to report GHG

FEDERAL REGULATORY UPDATES *(Continued)*

emissions more often, such as those reporting GHGs pursuant to the Acid Rain Program, will continue reporting under those other programs, as well as submit annual GHG emission reports under the new rule. All reporting will be to a central EPA registry.

For more information go to www.epa.gov/climatechange/emissions/ghgrulemaking.html.

(By Gabriell Sigel & Jennifer L. Cassel – Jenner & Block – 9/09)

EPA DISPUTES GE CLAIM THAT INDUSTRY CANNOT CHALLENGE CLEANUP ORDERS

Backed by environmentalists, EPA is disputing General Electric's (GE) long-fought claim that companies cannot challenge unilateral cleanup orders until after they comply with the orders, arguing companies do have a right to judicial review and that, if accepted, industry's position would radically transform the Constitution's Due Process Clause.

But GE -- backed by major industry groups including the U.S. Chamber of Commerce and the National Association of Manufacturers (NAM) -- maintains in a Dec. 8 brief in the case General Electric Company v. Lisa Jackson, et al. that EPA is misinterpreting the issue when it says so-called unilateral administrative orders (UAOs) do not violate industry's constitutional right to due process. The industry groups back this argument in amicus briefs filed with the U.S. Court of Appeals for the District of Columbia Circuit, and say the costs associated with the cleanups could force some companies out of business. The appellate court is scheduled to hear oral arguments in the case Feb. 12.

Under Superfund law, EPA has three main options when it determines cleanup is necessary at a site. The first two options involve EPA cleaning up the site itself and filing suit in federal court against any potentially responsible parties (PRPs) after the fact, or the agency first filing suit in federal court against a PRP in an effort to compel that PRP to clean up the site itself.

The third option, and the one at issue in the case, is that EPA can issue a UAO, which industry argues involves ordering a PRP to clean up a site without any opportunity for the company to challenge the order in court. If a PRP refuses to comply with a UAO, the company could under the law be subject to fines of $32,500 for each day of noncompliance in addition to a fine equivalent to three times the cost of the cleanup, NAM notes in its Sept. 22 brief. Only after the cleanup is complete is a PRP permitted under the law to launch a legal challenge to the UAO, NAM argues. Relevant documents are available on InsideEPA.com.

Industry is not challenging the first two options, because under them, "a PRP has a right to an immediate hearing before a neutral decision-maker in which it can challenge EPA's determination that the PRP is liable and the appropriateness of EPA's selection of the response action," NAM says.

"Absent an extraordinary circumstance involving an urgent need for government action -- which EPA concedes is never the case with UAOs -- the right to a pre-deprivation hearing is fundamental," the U.S. Chamber of Commerce says in its own Sept. 22 amicus brief. "In light of the stakes, the combination of unilateral action and non-exigent circumstances amount to a due process violation. This is particularly true because the cost of a hearing would be minimal, while the private interests at stake are substantial, and indeed can involve a company's very existence."

In a prior decision, a lower court ruled "that providing a hearing for every UAO would be too expensive considering that EPA routinely issues thousands of them," the Chamber notes. But this fact "only underscores the magnitude of EPA's constitutional violation," the Chamber argues.

In addition, the lower court's ruling "that GE had to prove a high error rate in the issuance of unilateral orders" is wrong because "the value of a pre-deprivation hearing before a neutral decisionmaker is not something that must be factually proven in a due process case," the Chamber argues. "Instead, the judgment concerning the value of such hearings was made long ago by the Framers who enshrined the due process guarantee of notice and an opportunity to be heard before a non-exigent deprivation into the Fifth Amendment."

EPA disputes industry's characterization of the UAO process and the provisions of the Superfund law under which the agency conducts them, arguing in a Nov. 9 brief that companies do have "the right to judicial review before" they are forced "to pay fines or incur cleanup costs."

The agency argues that it "gives potential UAO recipients many chances to be heard before it actually issues a cleanup order. Before even treating a party as a PRP, EPA formally notifies the party of its views and allows the company to respond with any relevant information, including information disputing its liability," the agency says.

In addition, before "selecting the cleanup remedy for a site, EPA invites, considers, and responds to comments from the PRP and the public," the agency argues. "And before issuing a UAO, EPA typically tries to negotiate a resolution with the PRP."

EPA also disputes industry's argument that a company cannot challenge, and that a court can not review, the agency's issuance of a UAO before a company is forced to pay for a cleanup. "If EPA wants to compel the cleanup the order calls for, it has to file a civil action in federal court to enforce the order," the agency says. "As a result, a PRP cannot suffer a UAO-inflicted property deprivation without getting a chance to defend itself in court."

The agency says that if it brings such an enforcement action to compel compliance with an order, Superfund law "allows a district court to review the company's liability and the legality of the UAO during that action. The UAO recipient can raise any legal defense it wants during the enforcement proceeding."

EPA acknowledges that the court can impose fines and punitive damages on the PRP if it ultimately concludes the UAO was lawful, but says the court can do so "only if it concludes the UAO recipient refused to comply 'without sufficient cause.'" The agency also acknowledges Superfund law "provides a high ceiling for those fines" but says the court "has discretion to abate them 'in whole or in part.'"

The agency also notes that PRPs can sue EPA for cost recovery after they complete a cleanup pursuant to a UAO and cites a recent ruling by the 9th Circuit in the case *City of Rialto v. West Coast Loading Corp.* as supportive of its argument that a PRP "can obtain judicial review of the validity of a UAO either *before* or *after* it has complied with the order." In the 9th Circuit case, industry had raised a similar constitutional challenge against EPA issuing UAOs (Superfund Report, Aug. 24).

EPA says GE is trying to "sidestep" its argument "by assuming that the Due Process Clause affords several novel protections." It says GE argues "the government must hold trial-type hearings before taking any action that could 'inform the market' of a company's potential legal liabilities, and thereby lead to any reevaluation of a company's stock price, credit rating, or 'brand value.'"

The agency says that if GE's argument was correct, "agencies would have to hold hearings before taking a host of actions -- like filing a complaint or issuing a policy report -- that have never been thought to deprive individuals of property interests. Accepting GE's proposals would radically transform the Due Process Clause."

(SUPERFUND REPORT – 12/14/09)

AUTO SITE CLEANUP LIABILITY MAY BOOST PUSH FOR REINSTATING SUPERFUND TAX

New legal filings show that entities holding liability for General Motors (GM) and Chrysler in their bankruptcy cases may be liable for part of $1.9 billion in future cleanup costs for sites contaminated by the auto industry, which activists say may boost a push for Congress to reinstate the Superfund tax on industry to pay for the cleanups.

Although the entities only hold partial liability at some complex sites where numerous parties are responsible, the filings may also help make the case for EPA to swiftly issue financial assurance rules, activists say. Such rules, which the agency has delayed issuing for decades, would require companies to prove they have enough funds on hand to clean up contamination.

The U.S. Attorney's Office submitted the filings ahead of a Nov. 30 deadline to file claims in the bankruptcy cases for the entities holding liability for GM and Chrysler, a process that senior agency officials say may be the only way to obtain cleanup funds for some of the contaminated sites. EPA officials recently said, however, that the agency may not be able to identify all contaminated sites in time for the deadline, while there may also be inadequate funds to deal with those sites that are identified -- creating problems for state and local governments (Superfund Report, November 30).

It is unclear whether the agency managed to identify all the cleanup sites before the deadline,

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though the U.S. Attorney's Office filed proof of claim documents obtained by Inside EPA that show that EPA has incurred about $98 million in unreimbursed cleanup costs at sites where the companies are at least partially liable. The agency predicts that the remaining cleanup cost at these sites is about $1.9 billion and that the entities are liable for about $36 million in civil penalties. Relevant documents are available on InsideEPA.com.

Sources say the total cleanup costs could be even higher, because there may be undiscovered water contamination at some of the sites that would be much more expensive to clean up than current estimates suggest.

The documents specifically list 49 sites in the bankruptcy cases for Motors Liquidation Company (MLC), the company created to deal with GM's liability, and Old Carco, the company formed to deal with Chrysler's liability. Both MLC and Old Carco are potentially liabile parties for cleanup costs at several of the sites. The documents also list eight multi-regional sites and 62 sites where the government is reserving its right to bring future liability claims.

The sites are dispersed across the country from New York to California, but many are in the states of New Jersey, Ohio, Michigan, Maryland and Pennsylvania. The totals do not include the costs incurred or predicted by the Department of Interior and the Department of Commerce, which were also included in the filing. The MLC filing included both sites that were owned by the company and third-party sites. The Old Carco filing only included third-party sites. The U.S. Attorney's Office declined to provide details about the differences between the filings.

Some of the sites where cleanup is expected to be most expensive are landfills or industrial areas where many companies are responsible and the bankrupt companies may have only a small portion of the liability.

A source with the activist Center for Health, Environment and Justice (CHEJ) says that if the auto cleanup sites are orphaned in the bankruptcy process -- meaning EPA cannot recover cleanup costs -- communities will likely increase pressure on Congress and EPA to write legislation and regulation to force industry to pay for cleanups, with one possible approach being a push by some Democrats to reinstate a Superfund tax on industry.

(SUPERFUND REPORT– 12/14/09)

INDUSTRY SEEKS TO EXPAND EPA CLEANUP FUNDING TO OFFSET AUTO LOSSES

Industry representatives say the government's role in helping bankrupt automakers shed their cleanup liability should lead EPA to revise its policy so that the government, not the other companies liable at contaminated sites, must pay for the portion of an estimated $2 billion in cleanup costs that may be "orphaned," or abandoned, by the auto companies.

But even without revisions to EPA's so-called orphan share policy, industry will seek to limit any increase in their liability by arguing in court that a recent Supreme Court ruling that allows liable parties to apportion any joint-and-several liability early in the litigation process frees them of liability that can be assigned to the automakers.

Both the policy and legal avenues should lead the agency to ask Congress for money to cover the bankrupt companies' cleanup obligations, industry sources say. But some sources fear that Congress could reinstate the expired Superfund taxes or limit liability apportionment in response to any effort to have the government cover the automakers' costs. An EPA spokeswoman did not respond to a request for comment by press time. At issue is the slew of sites that were contaminated in part by General Motors (GM) and Chrysler before the companies went bankrupt. During their government-facilitated restructuring the companies were split, allowing GM and Chrysler to emerge and leaving Motors Liquidation Company and Old Carco, respectively, to deal with the former companies' liability, including their cleanup liability.

The U.S. Attorney's Office submitted liability claims ahead of a Nov. 30 deadline in the bankruptcy cases showing that the entities are at least partially liable for $98 million in past cleanup costs and $1.9 billion in future cleanup costs. Senior agency officials say the bankruptcy proceedings may be the only way to obtain cleanup funds for some of the sites, although EPA and others have said the proceedings are unlikely to adequately cover those expenses.

Some of the sites where cleanup is expected to be most expensive are industrial landfills or other multi-party sites. Industry fears that if bankruptcy proceedings do not provide sufficient funds for the cleanup that they will be stuck with the automakers' cleanup costs under Superfund requirements that hold other potentially responsible parties (PRPs) jointly and severally liable for all of the cleanup costs.

In light of this prospect, industry source says EPA should revise its policy for dealing with cleanup shares that have been orphaned through government-facilitated bankruptcies such as the automakers' cases.

Under EPA's current orphan share policy, the agency will compensate the remaining PRPs that clean up sites for the orphan share up to 25 percent of either the response costs or the total past and future oversight costs, whichever is less. Adopted in 1995, EPA says the policy "provides a major incentive for responsible parties to perform cleanups and settle claims quickly without litigation, and reduces transaction costs by wholly or partly resolving the question of who should bear the burden of orphan shares," according to the agency's Web site.

But, one industry source says that EPA should amend its orphan share policy to fully compensate PRPs for orphan shares that arise out of bankruptcy proceedings in which the government has intervened. Industry believes it should not have to pay for another company that the government has let off the hook, the source says. "At some point I think there needs to be some kind of accountability for some rough justice within the Superfund program," the source says.

A revised orphan share policy would likely require the agency to ask Congress for more money for the cleanups, the source says. But EPA could also ask lawmakers for new funds independently of any policy changes as early as the fiscal year 2011 appropriations process, the source says.

(SUPERFUND REPORT – 12/14/09)

INDUSTRY CONCERN OVER EPA'S FUEL ADDITIVE STUDY HINTS AT MTBE FEARS

Petrochemical industry representatives are raising concerns about an EPA study showing significant risks posed by the gasoline additive ethyl tertiary butyl ether (ETBE), signaling concern about the agency's pending assessment of the more widely used methyl tertiary butyl ether (MTBE), which shares similar characteristics to ETBE.

At an October 7 listening session, industry representatives urged EPA to drop suggestions that ETBE may pose cancer risks in part due to indications that MTBE is carcinogenic.

"The assessment draws inference from MTBE and [tertiary butanol, an ETBE metabolite] carcinogenicity studies but fails to consider authoritative assessments of these data that conclude these substances are a low human cancer concern," according to comments by Marcy Banton, a toxicologist with LyondellBasell -- which may face significant cleanup liability over both chemicals.

Refiners and other companies produced large quantities of both additives to comply with a Clean Air Act mandate to blend additives into gasoline to reduce vehicle emissions. Lyondell and others stopped producing ETBE in 1996 when a federal tax incentive expired.

After municipalities reported widespread MTBE contamination, Congress, in the 2005 energy bill, banned MTBE, eliminated the oxygenate mandate and replaced it with a renewable fuel mandate. But dozens of state and municipal officials were pursuing damages claims against additive manufacturers and gasoline suppliers to clean up contaminated drinking water in hundreds of jurisdictions around the country.

In 2008, Lyondell, together with ExxonMobil, declined to join a $422 million settlement with several other energy companies to settle cleanup and other costs to address 59 separate cases filed on behalf of more than 550 plaintiffs. As a result, the non-settling companies could face significantly higher cleanup liability than settling companies, costs which could grow even more once EPA completes its upcoming MTBE risk assessment.

For example, a federal jury ordered Exxon to pay New York City officials $105 million to construct drinking water treatment facilities, while settling parties had previously agreed to pay $15 million.

Lyondell was also one of the MTBE producers that led unsuccessful industry lobbying in Congress in 2005 to exempt the chemical's manufacturers from some damages claims pushed by

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state and municipal officials. The legislative exemption failed after *Inside EPA reported* that a draft agency assessment had found the chemical is a "likely" carcinogen, pinpointing for the first time kidney and lymph node tumors as a result of MTBE exposure.

EPA has never finalized the 2005 draft MTBE risk assessment but, according to EPA's Web site, the agency is scheduled to complete internal review of the draft in the first quarter of fiscal year 2010 and finalize a draft assessment in the fourth quarter of FY10.

(SUPERFUND REPORT – 11/2/09)

LAWMAKER ASSERTS JURISDICTION TO PUSH WATERFRONT BROWNFIELDS BILL

The chair of the House Rules Committee has reintroduced legislation to establish a pilot program to facilitate the redevelopment of brownfields that are located along waterways, adding language giving her committee jurisdiction over the bill, which supporters say may prevent the bill from languishing as previous versions did.

Rep. Louise Slaughter (D-NY) introduced H.R. 3518 July 31. The bill is virtually identical to a bill she offered in February 2008, except that it contains a clause pertaining to rules, which allows Slaughter to claim original jurisdiction and hold a hearing on the issue in her committee to give the bill some momentum, according to a congressional source.

The Energy & Commerce and Transportation & Infrastructure committees also have jurisdiction. And the source says Rep. Henry Waxman's (D-CA) successful coup to oust Rep. John Dingell (D-MI) as chairman of the energy committee also works in the bill's favor because Waxman and Slaughter foster a close working relationship.

Slaughter, in introductory remarks on the House floor, said the bill would help lightly contaminated waterfront properties like the ones in Rochester, NY, in her district return to beneficial use despite the complications posed by both land and water liabilities. The bill establishes an additional $20 million fund to the existing brownfields program that would be specifically marked for contaminated properties that abut rivers, lakes or oceans, as well as establishing a panel composed of members of a number of federal agencies and concerned parties to develop guidance on how to best remediate those properties.

"Waterfront brownfields present challenges beyond typical environmental assessment and cleanup projects," Slaughter said, adding that cleanup also requires cooperation between multiple federal agencies. "This legislation would authorize [EPA] to establish a waterfront brownfields pilot demonstration . . . [and] would also establish an inter-agency panel on waterfront brownfields restoration . . ."

Slaughter's previous waterfront brownfields bill never left House environmental committees because it was not a legislative priority, a congressional source says. "The last bill didn't get too far -- we tried at the end of the 110th [Congress], but there wasn't much of anything getting through," the source says.

H.R. 3518, however, requires EPA to submit an annual report on brownfields to the energy and transportation committees and requires those committees to hold an annual hearing on the report. The bill includes language saying the annual hearing requirement is enacted "as an exercise of the rulemaking power of the House of Representatives."

This allows Slaughter to convene a hearing on the bill in her committee in order to give it some exposure, rather than rely entirely on Waxman and Rep. James Oberstar (D-MN), chairman of the transportation committee, to mark up the bill, the congressional source says. But the source insists that the purpose of the hearing will be to highlight the bill and not as a premise to assert the Rules Committee's jurisdiction over T&I or E&C subject areas.

"It's likely to be a hearing and not a markup," the source says. "It's just going to get some attention around it -- it doesn't give the Rules Committee any additional powers or anything."

The bill calls for the establishment of a four-year pilot program to oversee grants of up to $500,000 for "site characterization, assessment, and remediation" of waterfront brownfields. The bill also establishes a task force comprised of representatives from a variety of organizations, including EPA, the National Oceanic & Atmospheric Administration, the Army Corps of Engineers, state and local organizations, and any other body the EPA administrator chooses to include. The administrator will also be tasked with drafting a report within three years of the passage of the bill that makes recommendations on how to improve remediation of waterfront brownfields.

(SUPERFUND REPORT – 8/24/09)

NEW FEDERAL PUBLICATIONS

DoD Vapor Intrusion Handbook. This handbook was developed by the Tri-Service Environmental Risk Assessment Work Group (TSERAWG) to serve as a resource for remedial project managers (RPMs) who may need to investigate the vapor intrusion pathway at Department of Defense (DoD) sites. The Tri-Services of the DoD include the Departments of the Air Force, Army, and Navy, with the Department of the Navy (DON) including both the Navy and the Marine Corps. This handbook was developed to support RPMs working on both active and closed Air Force, Army, Navy, and Marine Corps bases, as well as Formerly Used Defense Sites (FUDS). The handbook is intended to provide a general framework for conducting vapor intrusion investigations under the Defense Environmental Restoration Program (DERP). Both residential and occupational exposure scenarios are discussed since both groups can be affected by vapor intrusion (January 2009, 171 pages). View or download at https://www.denix.osd.mil/portal/page/portal/content/environment/cleanup/WN/DoD%20VI%20Handbook%20Final%20Jan%2009.pdf .

National Contingency Plan Product Schedule. Subpart J of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) directs EPA to prepare a schedule of dispersants, other chemicals, and oil spill mitigating devices and substances that may be used to remove or control oil discharges. Subpart J is a section of the NCP which stipulates the criteria for listing and managing the use of dispersants and other chemical and biological agents used to mitigate oil spills. Subpart J is found in 40 Code of Regulations Part 300.910 (October 2009, 19 pages). View or download at: http://epa.gov/emergencies/content/ncp/product_schedule.htm .

NEW REPORT INDICATES U.S. GREENHOUSE GAS EMISSIONS WERE 2.2% LOWER FOR 2008

A new report has been released from the U.S. Energy Information Administration indicating that the total U.S. greenhouse gas emissions in 2008 were 2.2% below the 2007 total. The decline in total emissions was largely the result of drop in carbon dioxide (CO2) emissions. There were small percentage increases in emissions of other greenhouse gases, but their absolute contributions to the change in total emissions were relatively small. As a result, the increases in emissions of these gases were more than offset by the drop in CO2 emissions.

The decrease in U.S. CO2 emissions in 2008 resulted primarily from three factors: higher energy prices—especially during the summer driving season—that led to a drop in petroleum consumption; economic contraction in three out of four quarters of the year that resulted in lower energy demand for the year as a whole in all sectors except the commercial sector; and lower demand for electricity along with lower carbon intensity of electricity supply.

A link to the full report is here: Emission of Greenhouse Gases in the United States 2008.

(Env. Resource Center – 12/14/09)

EPA ANALYSIS SHOWS REDUCTION IN 2008 TOXIC CHEMICAL RELEASES

EPA has released its annual national analysis of the Toxics Release Inventory (TRI). The TRI database contains information on chemical releases into the air, land and water, as well as waste management and pollution prevention activities. The analysis of the 2008 data, the most recent data set available, shows that 3.86 billion pounds of toxic chemicals were released into the environment, a 6% decrease from 2007.

This is the first time EPA has released its annual analysis in the same calendar year as the data were reported. In August, the agency released to the public the raw TRI data prior to EPA analysis for the first time. EPA has made the data available more quickly to increase transparency.

The analysis, which includes data on 650 chemicals from more than 21,000 facilities, found that total releases to air decreased 14%, while releases to surface water increased 3%. This increase is partially attributed to a coal ash spill at a Tennessee Valley Authority facility in Kingston, Tennessee. Releases to land remain virtually unchanged from 2007, showing a 0.1% increase.

The report shows decreases in the releases of persistent, bioaccumulative, and toxic chemicals

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including lead, dioxin, and mercury. Total disposal or other releases of mercury decreased 11%. Dioxin releases or disposal decreased 77%, while lead releases decreased by 2%. Releases of polychlorinated biphenyls (PCBs) increased 121%. Because PCBs are no longer used in U.S. manufacturing, these releases represent the removal of PCBs from service for disposal at regulated hazardous waste facilities.

The analysis also shows a 5% decline in the number of facilities reporting to TRI from the previous year, continuing a trend from the past few years. Some of this decline may be attributed to the economic downturn; however, EPA plans to investigate why some facilities reported in 2007 but not 2008.

Earlier this year, EPA also restored the more comprehensive TRI reporting requirements that were in effect before December 21, 2006. As a result, the 2008 analysis provides communities with a more complete picture of local environmental conditions. EPA has begun a review of its TRI program to identify areas for improvement.

Information from industry is submitted annually to EPA and states. The data are reported by multiple industry sectors including manufacturing, metal mining, electric utilities, and commercial hazardous waste facilities. Facilities report by July 1 of each year.

TRI tracks the chemicals and industrial sectors specified by the Emergency Planning and Community Right to Know Act of 1986 and its amendments. The Pollution Prevention Act of 1990 also mandates that TRI reports include data on toxic chemicals treated on site, recycled, and burned for energy recovery. Together, these laws require facilities in certain industries to report annually on releases, disposal and other waste management activities related to these chemicals.

(Env. Resource Center – 12/14/09)

EPA SIGNS TWO RULES TO FURTHER PROTECT OZONE LAYER

EPA has announced two final rules that will further cut ozone-depleting pollutants, protecting the Earth's ozone layer and reducing harmful greenhouse gases. The rules reduce the availability and use of hydrochlorofluorocarbons (HCFCs), which are primarily used as refrigerants and harm the ozone layer. A diminished ozone layer allows more radiation to reach the Earth's surface, leading to serious health effects, such as skin cancer, cataracts, and weakened immune systems.

The first rule prohibits the use of specific HCFCs to manufacture new air-conditioning and refrigeration equipment beginning in 2010, while allowing limited HCFC use to service existing equipment. The second rule prohibits the sale, distribution, and import of air-conditioning and refrigeration appliances and their components containing certain HCFCs that are manufactured or imported after January 1, 2010. The rulemakings protect the ozone layer by decreasing the availability of these compounds as well as the demand for newly-produced equipment containing HCFCs.

These rules advance U.S. compliance under the Clean Air Act and the Montreal Protocol on Substances that Deplete the Ozone Layer.

(Env. Resource Center – 12/14/09)

DRAFT STUDY FINDS 'HAZARDOUS' EPA ASH RULES COULD SHUTTER COAL UTILITIES

Preliminary findings by a key electric power research organization find that between 190 and 411 coal-fired power plants could be shuttered if EPA's pending coal ash disposal rules regulate the waste as hazardous, which could boost an increasingly aggressive 11th-hour push by the utility industry to block any hazardous waste designation.

The Electric Power Research Institute (EPRI), a research organization that does not advocate for particular policy outcomes, is studying the possible impacts on coal-fired power plants if EPA designates coal ash as hazardous in its upcoming, first-time Resource Conservation & Recovery Act (RCRA) rules for the waste. Utility lobbyists fear a hazardous designation would be a "game changer" that would boost costs and cause plant closures.

EPRI's preliminary findings show a hazardous waste rule for coal ash could shutter from 190 to 411 coal-fired generation units in the Midwest, Mid-Atlantic, Texas and Southeast regions, Ken Ladwig, EPRI senior research manager, told a Dec. 10 House Energy & Commerce Committee environment panel hearing.

Additionally, Regional Transmission Organizations (RTOs) that move electricity across several states would see drops of between 4 and 19 percent in generation capacity, according to Ladwig's testimony at the hearing.

The largest RTO -- PJM Interconnection LLC which serves parts of Delaware, Illinois, Ohio, 11 other states and the District of Columbia -- would experience a 12 to 19 percent drop in generation capacity, the preliminary findings show. Texas would suffer a 7 to 14 percent loss, the RTO for the Midwest would lose between 5 and 8 percent of its capacity, and the Southeast regulated areas could face between a 4 and 9 percent drop in capacity, Ladwig said.

Ladwig was among a number of stakeholders at the hearing, where environment subcommittee Chairman Edward Markey (D-MA) urged EPA to include first-time restrictions on the beneficial reuse of coal combustion waste as part of its pending RCRA coal ash proposal, warning that some beneficial reuses of coal ash can result in heavy metals within the ash leaching out and contaminating water supplies.

While Ladwig cautioned that the findings are preliminary, EPRI has presented some early results to the White House Office of Management & Budget (OMB), which is reviewing EPA's coal waste proposal, expected later this month. The results focus on the specific impacts on coal-fired power plants if they were required under a hazardous waste designation to switch from "wet" coal ash disposal in surface impoundments and other ponds to dry coal ash storage, for example in a landfill. Environmentalists say EPA's rules should ban any future wet disposal of coal ash.

REVIEW OF STATE SOIL CLEANUP LEVELS FOR DIOXIN

EPA has announced the release of the final report entitled Review of State Soil Cleanup Levels for Dioxin, as announced in the May 2009 EPA's Science Plan for Activities Related to Dioxins in the Environment.

This final report summarizes a survey of state soil cleanup levels for dioxin and characterizes the science underlying these values. The objective of this project was to summarize existing state cleanup levels for dioxin in soil, together with their scientific bases where available. In May 2009, U.S. EPA Administrator Lisa P. Jackson issued EPA's Science Plan for Activities Related to Dioxins in the Environment (http://www.epa.gov/dioxin/scienceplan). Included in the plan was a commitment by the Agency to prepare this report as a way to inform the development of interim preliminary remediation goals (PRG) for dioxin in soil that will be developed by EPA's Office of Solid Waste and Emergency Response.

The new document is: U.S. EPA. Review of State Soil Cleanup Levels for Dioxin (December 2009). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-09/156, 2009.

EPA ISSUES TOUGHER NEW RULES FOR SHIPPING HAZARDOUS WASTE

The US Environmental Protection Agency (EPA) has toughened its regulations for the shipping of hazardous waste, including e-waste, for recycling between the US and other countries. The agency also added new procedures for imported wastes that flow through US transfer facilities in order to ensure that those facilities that end up with these wastes complete their recycling in an environmentally sound manner. The EPA also changed regulations for the recycling of spent lead-acid batteries and require that countries accepting batteries for recycling receive notification and give consent.

The new regulations increase the level of oversight and align US law with hazardous waste shipping procedures of the Organization for Economic Cooperation and Development (OECD), an international consortium that comprises 30 countries including the US. Moreover, it also strengthens US regulations under the Resource Conservation and Recovery Act (RCRA) that governs the shipment of hazardous waste within the US.

For more information on the final rule: www.epa.gov/epawaste/hazard/international/oecd-slab-rue.htm.

(Waste Business News – 12/29/09)

EPA PUBLISHES FINAL RULE ON ENDANGERMENT FINDING OF GHGS UNDER THE CAA

In a final rule, published in the December 15, 2009, Federal Register, EPA's Administrator Jackson formalized EPA's finding that six greenhouse gases (GHGs) taken in combination

FEDERAL REGULATORY UPDATES *(Continued)*

endanger both the public health and the public welfare of current and future generations. As part of the rule, EPA has announced that the combined emissions of these GHGs from new motor vehicles and new motor vehicle engines contribute to the GHG air pollution that endangers public health and welfare under CAA section 202(a). The findings are based on careful consideration of the full weight of scientific evidence and a thorough review of numerous public comments received on the proposed findings published April 24, 2009. The findings of this final rule are effective on January 14, 2010.

Pursuant to CAA section 202(a), the Administrator finds that GHGs in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare. Specifically, the Administrator is defining the "air pollution" referred to in CAA section 202(a) to be the mix of six long-lived and directly-emitted GHGs: carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF6).

The Administrator has determined that the body of scientific evidence compellingly supports this finding. The major assessments by the U.S. Global Climate Research Program (USGCRP), the Intergovernmental Panel on Climate Change (IPCC), and the National Research Council (NRC) serve as the primary scientific basis supporting the Administrator's endangerment finding. The Administrator reached her determination by considering both observed and projected effects of GHGs in the atmosphere, their effect on climate, and the public health and welfare risks and impacts associated with such climate change.

The transportation sector is a major source of GHG emissions both in the United States and in the rest of the world. The transportation sources covered under CAA section 202(a)—the section of the CAA under which these findings occur—include passenger cars, light- and heavy-duty trucks, buses, and motorcycles.

For additional information regarding these findings, go to the Web site:
www.epa.gov/climatechange/endangerment.html

(Env. Resource Center – 12/21/09)

EPA PERMIT RESPONSES SIGNAL MAJOR SHIFTS ON BACT TO ADDRESS GHGS

The Obama EPA is moving toward requiring integrated gasification combined cycle (IGCC) power generating technology and cleaner-burning fuels such as lower-emitting coal and natural gas as a best available emissions control technology (BACT) to limit greenhouse gases (GHGs) in permits for new or modified coal plants.

In response to several permit challenges from environmentalists, the agency has issued orders that strongly tout the agency's support for IGCC as an emissions control technology, though the agency has not yet taken the final step to mandate the technologies be considered in permit reviews.

Nevertheless, should EPA formally back these approaches, it would be a significant victory for environmentalists who have long argued that these are easily available technologies that can be immediately mandated to begin to address GHGs. The agency's move is also a departure from the Bush EPA, which backed industry arguments that permit writers could not consider IGCC or fuel switching in permits for new or modified sources because it would prompt a redefinition of the emissions source.

In a December 15 order in response to activists' petition to object to a Title V permit issued for the proposed John Turk coal plant in Arkansas, EPA is requiring the state to better justify why it rejected IGCC under BACT.

In another December 15 order responding to environmentalists' challenge to a Kentucky-issued Title V operating permit for the proposed Cash Creek Generating Station IGCC plant, EPA agrees the permit is flawed because state regulators failed to consider natural gas as an alternative to IGCC. The agency cautions, however, that this criticism "should in no way be interpreted as EPA expressing a policy preference for construction of natural-gas facilities over IGCC facilities to generate electricity," the order says.

In a third response to a Title V permit petition published Dec. 22, EPA is also indicating its willingness to require regulators to consider cleaner sources of coal, something the Bush EPA did not. In this response, relating to the East Kentucky Power Cooperative's Spurlock power plant, KY, EPA is granting environmentalists' request to more fully consider low-sulfur coal -- which is not found in Kentucky -- as an emissions control technology.

One industry source says the Cash Creek response contains enough caveats to limit it as a broad precedent, particularly for non-IGCC facilities, "but I think it does show the increasing trend of EPA's willingness to consider fuel switching and alternative fuels as part of BACT requirements."

(Inside EPA – 12/31/09)

EPA PROPOSES TIGHTER, COSTLIER SMOG LIMITS

The Obama administration in early January proposed tougher standards for reducing smog in a move it said would save lives and reduce respiratory illness, but businesses said the change would inflict new costs on employers and consumers in a weak economy.

The proposal is the latest shift toward stricter standards promised by the White House, which environmentalists have applauded but industry groups dislike.

The new smog standards, proposed by the Environmental Protection Agency, could compel power plants, refineries, gas stations and other businesses to take steps to reduce emissions of chemicals that help form smog. The EPA estimated that the costs of complying with the new standards could range between $19 billion and $90 billion annually, depending on the final standard. Much of the cost will be in the form of new technologies.

The standards could also lead to new restrictions on construction, farming and other activities that generate what is known as ground-level ozone, a primary cause of smog.

The proposal would lower the permitted level for ground-level ozone, which has been linked to respiratory illnesses. By reducing smog, the EPA hopes to reduce the incidence of asthma, particularly in children, whose developing lungs are more sensitive to smog.

Under the proposal, the EPA would set the acceptable ozone level in the air between 0.06 and 0.07 parts per million, stricter than the current 0.075 ppm. EPA officials and public-health groups claim the new standards would mean fewer visits to the emergency room for children with asthma, and longer lives for people with chronic lung disease -- saving the U.S. $13 billion to $100 billion annually. "Using the best science to strengthen these standards is a long-overdue action that will help millions of Americans breathe easier," EPA Administrator Lisa Jackson said.

According to the agency, more than twice the 322 counties that violate current federal ozone standards would fail to comply if the new standard were set at 0.06 ppm. For areas thrown into noncompliance for the first time, the standards could result in new pollution controls on large factories, or requirements for retail gasoline outlets to sell cleaner-burning fuel. Under federal law, states are required to submit plans to the EPA that detail how they will comply with the government's ozone standards. Those that don't submit such plans or fail to implement them risk losing highway funds.

The EPA plans to issue final standards by the end of August. Then, the federal and state governments will spend the next three-and-a-half years putting in place plans to meet the new standards.

—Ann Davis and Ana Campoy contributed to this article.

(By Mark W. Peters and Stephen Power – Wall Street Journal – 1/8/10)

NJ REGULATORY UPDATES

WETLAND MITIGATION REQUIRED FOR CERTAIN FRESHWATER WETLANDS GENERAL PERMITS

NJDEP has determined that mitigation is required for certain General Permits (GPs) under the NJ Freshwater Wetlands Protection Act (FWPA) rules. The rule changes were published in the Nov. 2, 2009 NJ Register and are in effect as of that date.

The new mitigation requirement for permanent impacts to wetlands and State open water applies to the following GPs:

•GP 2, underground utilities. Mitigation required only for permanent loss of wetlands and State open waters. The disturbance to forested wetlands is considered a permanent disturbance. Temporary disturbance to emergent and shrub scrub wetlands do not require mitigation.

•GP 6, isolated (non-tributary) wetlands. Only required for disturbance to wetlands and/or State open waters that are Waters of the US. That is wetlands under the jurisdiction of the Federal Clean Water Act Section 404 program, typically wetlands that are considered adjacent to streams. (see SWANCC decision).

•GP 10A and 10B for road crossings.

•GP 11 for stormwater outfalls.

•GP 21 for above ground utility lines. For permanent loss of wetland or State open waters.

•GP 27 for redevelopment of previously disturbed areas.

Amy S. Greene Environmental Consultants has a Q&A sheet available to explain the rule changes. Go to www.amygreene.com for more information

(Amy S. Greene Env. Consultants – November, 2009)

ENVIRONMENTALISTS SUE TO STOP DREDGING

Following New Jersey's suit against the Army Corps of Engineers last month because of its plan to move forward with dredging the Delaware River despite environmental objections, several environmental groups joined together in November in an effort to block the corps from deepening the waterway.

The Delaware Riverkeeper Network, the National Wildlife Federation, New Jersey Environmental Federation, Clean Water Action and Delaware Nature Society filed an independent challenge to the plans to deepen the river's shipping channel to 45 feet, as well as a motion to join a lawsuit filed by Delaware against the corps late last month.

"When the government is willing to break the law, citizens must rise up and defend it," Delaware Riverkeeper Director Maya K. van Rossum said.

"That's what we're doing today. We're defending our right to clean water, to clean air, to fish that we cannot just catch but feed to our children and to protect our wetlands that protect our communities from pollution and floods."

Corps officials declared earlier this year they planned to begin deepening the 103-mile shipping channel from its 40-foot depth within months, despite New Jersey and Delaware's rejection of a state underwater construction permit request.

Critics accused the agency of overriding the authority of both states and failing to fully examine the environmental consequences of dredging.

Supporters have argued the project is essential to keep the ports of the Philadelphia region viable as new generations of ships with deeper bottoms fan out across the world's oceans.

(Gannett ContentOne – 11/20/09)

NEW JERSEY SUPREME COURT STRIKES DOWN LOCAL ORDINANCES REQUIRING DEVELOPERS TO PROVIDE OPEN SPACE

In *New Jersey Shore Builders Assoc. v. Twp. of Jackson*, decided June 25, 2009, the New Jersey Supreme Court, in two consolidated appeals, struck portions of two local ordinances that required developers to set aside open space or make payments in lieu thereof, as a condition of municipal approval for development projects. The Court concluded that the Municipal Land Use Law ("MLUL") must be strictly construed and that "municipalities must exercise their powers relating to zoning and land use in a manner that will strictly conform with that statute's provisions." Since the MLUL does not provide for open space set asides, they cannot be imposed. An effort to overturn the Supreme Court's decision through amendment of the MLUL is anticipated.

(By John Gullace – Manko, Gold, Katcher & Fox – Client Alert – 9/09)

SURFACE WATER QUALITY STANDARDS - NUTRIENTS

NJDEP has adopted Nutrient Surface Water Quality Standards with the amendments proposed in April 2009. Based on comments received, the Department determined that it was appropriate to expand the narrative nutrient policies and narrative criteria to all stream classification. However these changes were too substantive to do on adoption. Therefore, the Department decided not to adopt the proposed amendments to the phopshorus critieria at this time and to propose additional amendments. The SWQS adoption as well as the new proposal are now available on the Department's website at: http://www.nj.gov/dep/rules. The adoption and new proposal will be published in the New Jersey Register on December 21, 2009.

The Department provided the public with an opportunity to review the draft Integrated Water Quality Assessment Methods Document to be used in developing the 2010 Integrated List and 303(d) list. The Department has revised the draft Methods Document based on comments received and the adopted SWQS. As such, the public is being provided with another opportunity for review this document. Please note, the comment period closes on January 20, 2010. This document is available at:
www.state.nj.us/dep/wms/bwqsa

As previously mentioned, Water Monitoring and Standards (WMS) has created an email subscription service. This service allows you to subscribe to receive information and updates on specific topics via email. Please go to the WMS web page at http://www.nj.gov/dep/wms/subscribe.htm, select your Listserv subscription(s), enter your email address, and click the "submit" button.

(NJ Water Environment Association – 1/4/10)

NJ REGULATORY UPDATES

GREEN HOUSE GAS MONITORING AND RECORDKEEPING

The Global Warming Response Act required the NJDEP to establish a greenhouse gas emissions monitoring and reporting program. The law also required NJDEP to monitor progress toward attaining the 2020 and 2050 greenhouse gas limits. On January 21, 2009, the DEP proposed rules as mandated by the Global Warming Response Act. The proposed rules modify the Emission Statement Rule which currently requires major sources to annually report releases of carbon dioxide and methane and set three new reporting requirements. After New Jersey filed its proposed rule, the U.S. Environmental Protection Agency published a proposed rule on April 10, 2009 that would require mandatory monitoring and annual reporting of greenhouse gas emissions by stationary sources that emit 25,000 metric tons of greenhouse gas emissions in any year starting in 2010. The NJDEP is in the process of determining the impact of national rule proposal on its own proposal.

(DVS/AWMA Connection – 12/09)

THE NEW JERSEY LSRP PROGRAM AND DUE DILIGENCE

By Glennon C. Graham, Jr., P.G.

On May 7, 2009, Governor Corzine signed into Law the Site Remediation Reform Act which established a Licensing Program for site remediation professionals. The Licensed Site Remediation Professional (LSRP) program established under the Site Remediation Reform Act (SRRA) went into effect on November 4, 2009. The Act fundamentally changes the way contaminated site in New Jersey will be cleaned up. Under the Act the NJDEP will no longer be issuing a "No Further Action Letter" (NFA) and will reduce the DEP oversight on the cleanups of contaminated sites. The DEP will accept LSRP certifications that contaminated sites have been fully investigated and remediated. Once the LSRP has certified that sites have been fully investigated and remediated, the LSRP will issue a Response Action Outcome (RAO), this replaces the DEP NFA letters. The NJDEP has three years to conduct an Audit once the RAO is submitted. The DEP is required to conduct at least one review of documents submitted by each LSRP within the next two years.

Generally, responsible parties will have two options: the first is to stay under the existing oversite program, which will have an indefinite time frame for completion, but will not be subject

NJ REGULATORY UPDATES *(Continued)*

to DEP Audit since the DEP will be involved with the remediation. The second option is to switch to the LSRP program, which will have a much quicker time frame, since the LSRP is directing the remediation. However, once the RAO is issued the DEP have three years to Audit the site.

Prior to performing Due Diligence work on behalf of one's clients, the first question to ask the client is if they want an LSRP performing the Due Diligence or a Non-LSRP performing the Due Diligence. If an LSRP is performing the Due Diligence and identifies any discharge on the site, the LSRP must notify both the party responsible for the remediation as well as the NJDEP, except for discharges resulting from historic fill. If an "immediate environmental concern" (IEC) is identified during the Due Diligence the LSRP must notify the party responsible for the remediation as well as the NJDEP immediately.

For more information on the LSRP program please contact Gary R. Brown, P.E., L.S.R.P. at 610-265-1510 ext.234 or Glennon C. Graham, Jr., P.G. at 856-467-2276 ext.122 or visit the following website: www.state.nj.us/dep/srp/srra.

TECHNOLOGY UPDATES

JURY AWARDS SIGNIFICANT DAMAGES VERDICT FOR MTBE CONTAMINATION

In October 2009, a federal court jury found ExxonMobil Corp. ("Exxon") liable for $104.7 million in compensatory damages to plaintiff New York City for polluting city drinking water wells with the gasoline additive methyl tertiary butyl ether ("MTBE"). Exxon's decision not to settle with the city left it the lone company (of among more than 20) to go to trial. The jury concluded that Exxon was liable for spilling gasoline from six service stations in Queens Borough and as a supplier for failing to adequately warn of the dangers posed by the product. Exxon defended the claims arguing that its service stations were not the source of MTBE contamination of drinking water and that the concentration of MTBE was too low to constitute a "legally cognizable injury." These defenses were rejected by the Court and the jury.

The jury award did not include punitive damages but the award was based on Exxon's portion of the $250 million projected cost to construct and operate a water treatment system for the City. The jury also factored in preexisting conditions and responsibility of other entities in determining its award. Despite not being assigned 100 percent of the costs, this award may influence defendants in other similar pending and anticipated cases in federal courts to settle their claims, rather than risk such significant awards.

(by Lynn Rosner Rauch, Manko, Gold, Katcher & Fox, Client Alert – 12/09)

EPA STUDY FINDS TOXINS IN FISH WIDESPREAD

Nearly half of lakes and reservoirs nationwide contain fish with potentially harmful levels of the toxic metal mercury, according to a federal study released in November.

The Environmental Protection Agency found mercury — a pollutant primarily released from coal-fired power plants — and polychlorinated biphenyls in all fish samples it collected from 500 lakes and reservoirs from 2000-2003. At 49 percent of those lakes and reservoirs, mercury concentrations exceeded levels that the EPA says are safe for people eating average amounts of fish.

Mercury consumed by eating fish can damage the nervous system and cause learning disabilities in developing fetuses and young children.

Fewer lakes and reservoirs — 17 percent — had fish containing polychlorinated biphenyls, or PCBs, above recommended levels. PCBs were widely used as coolants and lubricants until they were banned in the late 1970s, but because they last in the environment for long periods of time, they can still be found in fish. PCBs have been linked to cancer and other health effects.

The study is the latest to highlight how widespread mercury pollution has become.

In August, the U.S. Geological Survey released a study of fish contamination based on a survey of 300 streams nationwide. That research found mercury in all fish sampled, but only about a quarter of the fish had mercury levels exceeding EPA levels.

(AP/Gloucester County Times – 11/11/09)

CAULKING IN SCHOOLS MAY CONTAIN PCBS

Buildings, particularly ones constructed of masonry, that were built or renovated during the 1960s or 1970s may contain caulking with high amounts of PCBs. PCBs were a component in caulking used to seal joints between masonry units and around windows. The use of PCBs in caulking stopped in the late 1970s. PCBs have significant health effects including effects on the immune system, the reproductive system, the nervous system, the endocrine system and possibly cancer. PCB-containing caulking has the potential to cause contamination of air and dust and, in at least one case, has required special building cleanup.

A survey of PCB content in caulking was recently conducted in the Boston area. The sampled buildings included schools, churches, museums and office buildings. Eight of the 25 samples collected had PCBs in excess of 50 ppm, the amount the United States Environmental Protection Agency uses to classify the material as PCB waste. A number of studies have indicated that PCB-containing caulking may result in exposures to building occupants and workers who maintain the material. One study in a German school found teachers with moderate elevations of PCB levels in their blood apparently related to PCBs in caulking.

It is recommended that caulking in buildings be sampled for PCBs if PCB-containing caulking is likely. If PCBs are present, special management programs should be implemented to ensure students, maintenance workers, teachers and other building occupants are protected. Building renovations to repair or replace PCB-containing caulking require special control methods.

Source: Herrick, R., McClean, M., Meeker, J., Baster, L. and Weymouth, G. (2004). An unrecognized source of PCB contamination in schools and other buildings. Environmental Health Perspectives 112(10), 1051-1053.

On September 25, 2009, EPA announced new guidance for school administrators and building managers with important information about managing PCBs in caulk and tools to help minimize possible exposure. Go to: www.epa.gov/pcbincaulk/ for more information.

For more information on this topic, call RT's Dominic Marino at 856-467-2276

TECHNOLOGY UPDATES

ACTIVISTS SAY COAL ASH SURVEY BACKS CALL TO ELIMINATE WET STORAGE

Environmentalists are citing recent EPA data and other research they say boosts their long-running bid to regulate coal waste as hazardous and ban wet disposal of the waste, while industry appears to be voluntarily moving away from the disposal method and open to some type of agency mandated phaseout of the practice.

The agency recently released its list of surface impoundments -- also known as coal ash ponds or "wet disposal" sites -- showing there are 584 coal ash ponds operating in 35 states. The raw data was released in response to a Freedom of Information Act request from a coalition of environmentalists, and was compiled from self-reported information by electricity utilities that EPA requested in a letter sent out to utilities in March.

The data show that dozens of the wet disposal ponds have either had leaks or discharges in the past or have ongoing leaks at present. It also indicates that the majority of those spill events, which range in severity from several hundred gallons to several million gallons of coal waste, have occurred over the past ten years.

At the same time, a peer-reviewed study by Duke University researchers published Sept. 1 shows that a massive coal ash spill at a Tennessee Valley Authority (TVA) site in December could create health risks for nearby residents, which activists say underscores their concerns about adverse effects resulting from coal ash.

Activists say the reports show that wet disposal ponds, where power plants dispose their

TECHNOLOGY UPDATES (Continued)

coal combustion waste, are more widespread and less safe than previously thought, and that justifies EPA issuing strict Resource, Conservation & Recovery Act (RCRA) rules to control the handling of coal waste and disposal.

"There is no lingering doubt, these coal ash dumps are dangerous and must be regulated immediately," Earthjustice attorney Lisa Evans said. "The EPA list provides a clear view of the substantial extent of the threat."

Groups including Earthjustice have long advocated that EPA issue strict hazardous waste rules for coal waste that include a ban on wet disposal, stepping up their bid following last year's TVA spill.

In May, activists released a study using EPA data to conclude that groundwater and surface water around surface impoundments results in much higher cancer rates among the surrounding population. And the Duke study, published in the Sept. 1 edition of Environmental Science & Technology, found that coal ash stored by TVA in wet disposal that then spilled can create health risks when it dries out. The ash turns into a fine particulate dust and becomes suspended in ambient air, exposing the community to elevated levels of arsenic and mercury, and radium in the dust. The study also noted though the spill's hazard to aquatic life downriver was far lower than expected.

Utility industry sources were not available for comment on the EPA and Duke data, but industry has previously said it favors EPA regulation of coal waste as non-hazardous. Industry would also prefer that any regulation be results-oriented and that the agency's upcoming coal waste rules should not prohibit any type of disposal so long as it is sufficiently protective. (EPA was slated to propose coal waste RCRA rules by the end of 2009 but has recently extended the date.)

(SUPERFUND REPORT – 9/7/09)

OUTSIDE THE BOX: USING POSTAL FLEET TO STORE ELECTRICITY

From horse-drawn wagons to stage coaches, trains and 18-wheelers, the U.S. Postal Service has used virtually every mode of transportation to deliver the mail. But a New York lawmaker says it's time for the mail service to start using at least 20,000 electric vehicles to stamp out the agency's environmental waste.

The Postal Service said it operates the largest civilian fleet of vehicles in the world, with about 220,000 vehicles traveling more than 1.2 billion miles each year. The agency's entire fleet consumed 121 million gallons of fuel in 2008, costing it roughly $1.3 billion, officials said. Agency vehicles average 10.4 miles a gallon since most drive slowly and make frequent stops between mailboxes.

Rep. Jose E. Serrano (D-N.Y.) wants to put the postal fleet to use during off-hours to help alleviate the nation's overworked power grids. He introduced a bill Wednesday that would give eventually give $2 billion to the Energy Department and Postal Service to convert current mail trucks or manufacture new ones that use vehicle-to-grid technology or V2G, as it's known.

The technology allows electricity to flow from plug-in electric or battery-powered vehicles to power lines, feeding excess electricity to the vehicles when they're not in use. In this case, postal vehicles would become temporary storage units for electricity. When necessary, power grids could retrieve electricity from the vehicles.

(By Ed O'Keefe, Washington Post – 12/17/09)

N.Y. SCIENTISTS TO STUDY EFFECT OF EVERYDAY TOXINS

New York scientists have been awarded a $5 million federal grant to study long-term human exposure to chemicals in the environment.

Chemicals can pop up in plastic bottles, toys, medical equipment and pillows and upholstery. Scientists are looking to see if micro-amounts of environmental compounds that humans are exposed to will stay in the body, or have lasting effects. California and Washington state also have been awarded grants.

Scientists will take samples of urine, blood and saliva, and even test the breath of subjects to get an idea of what is in their bodies right. They'll measure how much and what kinds of chemicals are flowing through blood and fat tissue. Some of those chemicals are metabolized and leave the body, while others hang around.

"The fact that we have, and can measure, some of these chemicals in people does not necessarily mean that they cause disease, and we're very careful to mention that," said Dr. Kenneth Aldous, Director of the Division of Environmental Health Sciences at the state Department of Health's Wadsworth Center laboratories. "However, the fact that they are in our bodies and that they may be increasing _ which is something biomonitoring can tell us _ may be important down the road measuring their correlation with disease."

New York scientists will study the toxins in people's bodies in different parts of the state and compare them to national data. Some populations are being watched for specific exposures. For example, the densely populated New York City area could have more people exposed to car exhaust, while Asian communities may have higher mercury levels because of their frequent consumption of fish.

Scientists still are exploring what effects various chemicals have on humans, but three that are being closely watch are chemical compounds known as phthalates, Bisphenal A and PBDEs. The human health effects of low levels of these chemicals are unknown, but they have been shown in animal studies to disrupt several systems.

(Gloucester County Times – 12/28/09)

DRINKING WATER – OLD QUALITY CONCERNS ARE BACK

An increasing number of public drinking water supplies have been found to contain multiple carcinogens at low concentrations that are still considered legal, according to a recent article in the New York Times. A 35-year old federal law which regulates drink water, the Safe Drinking Water Act passed in 1974, remains outdated.

The Act regulates 91 contaminants in drinking water, yet more than 60,000 chemicals are used in the United States according to the United States Environmental Protection Agency estimates. The Act does not regulate private wells. EPA scientists also have data which suggests that the current levels of many contaminants are set too high, but with outside pressures from industry, the EPA has had not updated the Safe Drinking Water Act since 2000. Additionally, the Act does not address the cumulative risks of multiple contaminants being present.

Ms. Lisa Jackson, the Administrator of EPA, has asked Congress to amend the laws governing how the EPA assesses chemicals and has issues policies to shield the Agency's scientist from outside forces, so that glass of water we all enjoy, which is legally safe, may actually be healthier for us all.

(NY Times – December 17, 2009)

NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION UPDATES ITS BROWNFIELDS PROGRAM

In December, the New York Department of Environmental Conservation, provided a number of updates to its Brownfields program. New remediation policies and guidance documents were made available, and are subject to public comment. Documents include the state's policy on soil cleanup, updated Technical Guidance for Site Investigation and Remediation, Eligibility Opinions for the Brownfield Cleanup Program, Brownfield Site Cleanup Agreements, and a Citizen Participation Handbook, for remediation programs.

For more information go to:

www.dec.ny.gov/regulations/2393.html

PA UPDATES

PENNSYLVANIA PROPOSES NEW WASTEWATER TREATMENT REQUIREMENTS FOR TOTAL DISSOLVED SOLIDS

On November 7, 2009, the Pennsylvania Environmental Quality Board ("EQB") published for public comment proposed regulations that would establish significantly more stringent Total Dissolved Solids ("TDS") standards for certain wastewater treatment plant operations. Comments on the proposed regulations may be submitted until February 5, 2010.

High TDS wastewaters subject to the new regulations are defined as a "new discharge" of high TDS that did not exist on April 1, 2009, and include TDS concentration that exceeds 2,000 mg/l or a TDS loading that exceeds 100,000 pounds per day. The proposed regulation also extends to expanded or increased discharges from a facility in existence prior to April 1, 2009. If finalized in their current form, the proposed regulations would largely be implemented by the Pennsylvania Department of Environmental Protection ("PADEP") through the National Pollutant Discharge Elimination System ("NPDES") permit program.

Under the proposed regulations, high TDS effluent criteria have been established along with provisions for exceptions to the effluent criteria where industries are already subject to federal criteria for TDS, total chlorides, and total sulfates. In addition, the section establishes specific criteria for new sources of high TDS wastewater from fracturing, production, field exploration, drilling, or completion of oil and gas wells (e.g., the Marcellus Shale formation). The proposed high TDS effluent requirements for new discharges are as follows:

- discharge may not contain more than 500 mg/l of TDS as a monthly average;

of total chlorides as a monthly average; and

- discharge may not contain more than 250 mg/l of total sulfates as a monthly average.

As a result of these proposed regulations, new or increased discharges will be required to install advanced treatment (e.g., reverse osmosis or ultra filtration) to meet the effluent requirements. PADEP projects that the costs for treatment of high TDS wastewaters would be approximately $0.25/gallon. New or expanded high TDS wastewater sources will not be permitted under the proposal unless the applicant proposes to install adequate treatment of TDS by January 1, 2011.

(By Marc Gold and Michael Nines, Manko, Gold, Katcher & Fox, Client Alert – 12/09)

PENNSYLVANIA SUPREME COURT'S MERCURY OPINION MAKES THE TIME TO APPEAL A RULE EVEN LESS CLEAR

Pennsylvania administrative law has a quirk: when the Commonwealth adopts a regulation, disappointed parties typically cannot challenge it until the regulators apply the rule in a specific case. Only rarely can a party in Pennsylvania get to court prior to enforcement. The Pennsylvania Supreme Court recently seemed to expand the set of cases in which pre-enforcement judicial review of regulations can be available in the Commonwealth. PPL Generation, LLC v. Department of Environmental Protection, No. 7 MAP 2009 (Pa. Dec. 23, 2009).

The conventional assumption about administrative practice is that when an agency adopts a regulation, disappointed parties can challenge that regulation immediately. That is the practice under most federal statutes. For example, regulations adopted to implement most of the major federal environmental programs not only may be challenged promptly after the Environmental Protection Agency (EPA) adopts them, they must be challenged at that time. So, for instance, when EPA makes most rulemaking decisions under the Clean Air Act, disappointed parties may seek review in an appropriate court of appeals, but only for 60 days following promulgation of the regulation. 42 U.S.C. § 7607(b)(1). "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." Id. § 7607(b)(2). One will find similar provisions in most other federal environmental statutes.

Pennsylvania has precisely the opposite practice. When the Environmental Quality Board (EQB) adopts a regulation or the Department of Environmental Protection adopts a policy, one must await enforcement to challenge that regulation or policy. The Supreme Court has been fairly consistent on this point.

The federal rule requiring prompt review of regulations can have advantages and disadvantages over the Pennsylvania rule. Early review forces trade associations and environmental advocates to marshal their policy arguments early and in one forum. If the regulation has problems, they will come to light in one court early on, and after that all of the parties can have regulatory certainty. On the other hand, under the federal rule, the time to seek judicial review can come and go before one even knows that one is regulated. The Pennsylvania rule allows the Environmental Hearing Board and the reviewing courts to have real facts to consider.

Uncertainty over which rule applies can be the worst of both worlds. One cannot know whether one has to organize a law suit in the Commonwealth Court immediately after the EQB adopts a rule or whether one should await issuance or denial of a permit or an enforcement action.

The Supreme Court's PPL Generating opinion considered a case meshing federal and state regulatory programs, and therefore seemed to expand the narrow set of cases in which one must seek pre-enforcement review in Pennsylvania. The specific issue in that case involved Pennsylvania's regulations governing emissions to the air of mercury from coal- and oil-fired power plants. The federal Clean Air Act requires adoption of technology-based standards to be imposed by permits for sources of hazardous air pollutants included on a list prepared by EPA. EPA in the last federal administration sought to relieve power plants from stringent technology-based standards. EPA removed mercury from the list of hazardous air pollutants, and in place of regulation under section 112, EPA set up a trading system called the Clean Air Mercury Rule under which each state would receive an allocation of a certain number of pounds of mercury that sources within the state could discharge each year. Sources could then buy and sell allowances. Environmental advocates challenged the de-listing of mercury and the Clean Air Mercury Rule in federal court. Ultimately, they prevailed. New Jersey v. Environmental Protection Agency, 517 F.3d 574 (D.C. Cir. 2008).

Meanwhile, Pennsylvania exercised its option not to participate in the Clean Air Mercury Rule, and instead adopted its own regulatory program. State law would only permit adoption of that regulation if mercury were not on the federal list of hazardous air pollutants. Power plant operators challenged adoption of the state rule in state court. When the petitioners in New Jersey v. EPA prevailed, mercury was reinstated on the federal list. Therefore, the state petitioners sought summary judgment in the Commonwealth Court: mercury was on the federal list, so Pennsylvania could not regulate it differently from whatever federal scheme EPA adopted.

In defending its rule, the Commonwealth argued that judicial review was premature. None of the petitioners in PP&L Generating had received either a permit to construct a power plant (known in Pennsylvania as a "plan approval") or a permit to operate a power plant that contained an enforceable mercury limitation. Therefore, the Commonwealth argued, review was not ripe.

The Supreme Court accepted the power plant operators' argument that they must have review because the capital requirements of achieving large mercury reductions beginning in 2010 precluded the operators from waiting to place their equipment orders. They would either have had to take very costly steps now or to put themselves in a position from which they could not expect to comply with the Pennsylvania rules later. Accordingly, the court found this case to be like Arsenal Coal.

By using that rationale, the Supreme Court effectively made reviewability turn on an estimate of the costs of complying with a regulation before the Department of Environmental Protection (or other regulator) has decided on the steps that the regulated entity must take and the schedule on which it must take them. Costs can be relevant to establishing those steps and that schedule.

While the court took relatively prompt action to regularize regulation of coal- and oil-fired power plants in Pennsylvania, and saved the state from large dislocations caused by the mercury rule, it also may have created a long-run problem for regulated entities and environmental advocates. Failure to seek review of regulations in the Commonwealth Court immediately after promulgation can end up precluding parties from later

PA UPDATES

PA UPDATES *(Continued)*

challenges when they receive unacceptable permits. Until the implications of this decision play out, prudent parties may wish to be somewhat more aggressive about filing protective appeals early when the Commonwealth adopts environmental and other rules.

(By David G. Mandelbaum, GreenbergTraurig – 12/09)

RULE PROPOSAL TO INCREASE AIR QUALITY PROGRAM FEES

The Pennsylvania Environmental Quality Board (EQB) published a proposal in the PA Bulletin to amend existing requirements and fees codified in 25 Pa code Chapter 127, Subchapter I (relating to plan approval and operating permit fees), and add new categories of fees to that subchapter to address modifications of existing plan approvals and requests for determination of whether a plan approval is required. The proposed rulemaking would also add a new section to address fees for risk assessment applications. The proposed rulemaking also amends the existing annual emission fee paid by Title V facilities. The proposed rulemaking also adds Subchapter D (relating to testing, auditing, and monitoring fees) to Chapter 139, to add new categories of fees to address PADEP-performed source testing, test report reviews and auditing and monitoring activities related to continuous emissions monitoring systems (CEMS).

Public comments can be submitted either electronically to RegComments@state.pa.us until December 21st or via mail to the EQB's address in Harrisburg (see above link for address).

(DVC/AWMA Connection – 12/09)

AVAILABILITY OF GENERAL NPDES PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH CONSTRUCTION ACTIVITIES (PAG-02)

The PADEP is reissuing the National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges Associated with Construction Activities (PAG-02, 2009 Amendment) for 2 years effective December 8, 2009. USEPA has recommended that this renewal be of shorter duration in light of the anticipated issuance of the final "Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category" proposed November 28, 2008 (73 FR 72,561) applicable to this category of NPDES discharges, and in anticipation of finalization of revisions to Pennsylvania's Chapter 102 Erosion and Sediment Control and Stormwater Management regulations proposed at 39 Pa.B. 5131 (August 29, 2009).

(DVC/AWMA Connection – 12/09)

DEP INCREASING PERMIT FEES BY $23.4 MILLION TO OFFSET DRAMATIC BUDGET CUTS

The Environmental Quality Board this week took the latest in a series of steps to adopt increases in permit review fees for the Department of Environmental Protection totaling about $23.4 million to help offset the dramatic cuts in the agency's General Fund budget.

The EQB adopted changes to Chapter 92 for comment which would result in increasing NPDES water quality permit fee revenue from about $750,000 annually to about $5 million. In addition to increasing permit review fees, the agency is also proposing an annual permit administration fee for the first time.

The new NPDES fees will have an impact on 5,000 industrial and public wastewater treatment systems across the state as well as about 5,000 applicants applying for NPDES General Permits.

In July the EQB finalized changes to permit fees for Marcellus Shale natural gas drilling applications to increase revenue from about $935,000 a year to $8.4 million for FY 2009-10.

In June changes were proposed to Chapter 102 Erosion and Sedimentation regulations to increase application fees to yield about $7.3 million annually instead of about $635,000. Much of the increase-- about $5 million- would go to county conservation districts which perform this permit review work.

Other fee changes include--

-- Proposed Laboratory Accreditation fees increased from $500,000 to $1.3 million;

-- Proposed Air Quality fee increases from $20.2 million to $24.4 million; and

-- DEP's Mining and Reclamation Advisory Board is now consider substantial fee increases for mining permits.

Only the Marcellus Shale fees have been finalized so far.

(PA Environment Digest – 11/23/2009)

DEP STORAGE TANK PROGRAM REGULATORY AMENDMENTS TOOK EFFECT IN LATE DECEMBER

Amendments to the Storage Tank Program Regulations will take effect December 26. These amendments represent final actions to satisfy Underground Storage Tank Compliance Act provisions in the Federal Energy Policy Act of 2005 and related U.S. Environmental Protection Agency Guidelines to States for implementing the Underground Storage Tank Program. (formal notice)

This final rulemaking adds underground storage tank operator training requirements to the existing regulations. The rulemaking establishes three distinct classes of storage tank operators, who must be designated by tank owners and trained by August 8, 2012.

Required and acceptable forms of training are addressed for each class of operator. There are also related recordkeeping requirements, but no new reporting requirements. Existing regulations provide for DEP approval of training providers and courses.

For questions concerning the regulatory amendments, contact DEP's Storage Tank Program at 1-800-42TANKS (PA Only) or 717-772-5599, or send email to: eptanks@state.pa.us.

(PA Environment Digest – 12/28/2009)

RT's Recent Email Blasts

For more information visit our webpage at:
http://rtenv.com/email_blast_archive.html

Date	Article-Download	Description
January 6, 2010	SPCC Rules	Compliance Required by January 14th
January 6, 2010	NJ Site Remediation & Reform Act	Options for Property Seller/Buyers & Those Undertaking Remediation
January 5, 2010	EPA Issues Final Rule	Effluent Guidelines for Discharges From Construction and Development Sites
December 29, 2009	SPCC Rule Amendments	EPA Revised Federal Spill Prevention Control & Countermeasure
October 29, 2009	In NJ – LSRP Time is Here; RT is Ready	NJ Will Be Referred to Licensed Site Remediation Professionals to Investigate & Remediate

STORMWATER REVISIONS IN PA COMING FROM ALL DIRECTIONS

Revisions to stormwater laws rules and regulations are currently coming from all directions. Recent initiatives include:

EPA effluent guidelines for discharges from construction and development sites (see the January 5th, RT Email Blast).

Revisions to Pennsylvania Chapter 102 Water Quality Rules, including regulations on buffers, and placing restrictions on certain sensitive sites, for the first time.

Revisions to the Pennsylvania DEP Stormwater Manual, recently noticed.

An underlying issue that continues to be wrestled with is – *Who is responsible for post construction stormwater management at developed and redeveloped sites?* This is not a problem in Philadelphia where the Water Department is a designated stormwater utility, with a budget for stormwater management. Stormwater utilities have been slow to develop in the United States, but Philadelphia is clearly leading the way to help address its combined sewer overflow problem.

For more in-depth information on stormwater, be sure to attend the Spring Mid-Atlantic Environmental and Energy Conference on April 13th & 14th, at the Radisson Penn Harris Hotel and Convention Center, in Camp Hill near Harrisburg. The Pennsylvania Chamber of Industry is sponsoring this conference. RT Principals Gary Brown and Justin Lauterbach will be speaking on Stormwater Management, including the new State and Federal initiatives. For more information on this conference go to: http://www.pachamber.org.

-Justin Lauterbach

PA E&S RULES BEING REVISED

PADEP has proposed major rule changes for Title 25 PA Code Ch. 102, Erosion and Sediment Control and Stormwater Management (dated August 29, 2009). It is anticipated that the proposed rules will be in effect by the spring of 2010. The proposed rule changes update erosion and sediment ("E&S") control requirements, establish riparian forested buffer provisions, creates a Permit-By-Rule option, and incorporates the Federal Clean Water Act "Phase II" National Pollutant Discharge Elimination System ("N.P.D.E.S.") permits for stormwater discharges associated with construction activities including: post construction management ("PCSM") requirements. Changes include:

Updated Permit Fees

New Riparian Forested Buffers – Along watercourses:

*150' forested buffer would be required on all Exceptional Value ("EV") watercourses and impaired waters

*100' forested buffer would be required on all other watercourses.

*Existing buffers on a site must meet the requirements proposed by PADEP for native species and for the control of invasive species.

Permit-By-Rule (PBR) – A Permit-By-Rule may be used for low impact projects with riparian buffers but its use is limited to a small percentage of sites within PA due to the many exclusions (steep slopes, geologic formations, Brownfields redevelopment sites, sinkhole development, etc). Under the PBR, a Professional Engineer could certify the Erosion and Sediment Control Plan and Post Construction Stormwater Management Plans.

RT assisted the PA Environmental Council with providing comments on the proposed revisions. Call Gary Brown for more information.

RT ESTABLISHES NON-LSRP DUE DILIGENCE GROUP

Due to client concerns that using an LSRP on a site where certain environmental conditions may be found, RT has established a non-LSRP Due Diligence Group, headed up by Justin Lauterbach. Several environmental professionals in RT's New Jersey office report to Justin, who have in-depth experience in completing Phase I and Phase II Environmental Site Assessments, and Preliminary Assessments and Site Investigations under NJAC 7:26E.

NJDEP's unusual added provision to the Site Remediation Reform Act and LSRP program, requires certain Immediate Environmental Conditions (IEC) to be immediately reported, by the professional, which blurs the distinction between the professional and his or her clients. Requirements for immediately released reporting are not new, but it has become clear that NJDEP has not provided enough of an objective guidance of what constitutes an IEC condition, and problems with reporting apparently will only be reported to a Licensed Site Remediation Professional Board, which is not really set up yet.

We at RT believe that these situations can be handled professionally, and, when there are planned property transactions, there is almost always a way to deal with environmental conditions and address concerns. In our New Jersey Due Diligence Group headed by Justin, we offer more than seven years of in-depth experience throughout the state, and we recently completed non-LSRP work at more than a dozen sites, in Central New Jersey, for a utility. This work was completed in a relatively short timeframe, to meet all environmental, regulatory and business transaction objectives.

For more information on this group, you can reach Justin at 215-370-6554.

PENNSYLVANIA BULLETIN NOTICES
RULEMAKING IN PROCESS – 2009
Erosion and Sediment control and Stormwater Management 8/29/09
Part 1 and Part 2 MACT Applications for industrial, Commercial, and Institutional Boilers and Process Heaters; Notice of Availability 8/29/09
Safe Drinking Water – General Update 8/29/09
Proposed Revisions to General NPDES Permit for Stormwater Discharges Associated with Construction Activities (PAG-2); Public Notice of Availability; Correction Notice 8/29/09
Control of NOx Emissions from Glass Melting Furnaces 9/12/09
Creating of Governor's Invasive Species Council 9/18/06
Temporary Radioactive Material Regulatory Relief 9/19/09
Proposed Amendments to Radioactive Material Regulations 9/21/09
Lead and Cooper Rule Short Term Revisions 9/26/09
Corrections- 10/3/09
Proposed Designation Recommendations for the Revised 2008 Lead National Ambient Air Quality Standards 10/3/09
Approval of Mercury Thermostat Collection and Recycling Programs 10/3/09
Notice of Issuance of Processing and Conversation of Municipal Waste Into a Fuel Product; General Permit WMGR037 10/3/09
Establishment of a Proposed "Baseline" of Existing Withdrawals of Great Lakes Basin Water Users 10/10/09
Interstate Pollution Transport Reduction; Proposed 2009 Ozone Section NOx Emission Limits for Nonelectric Generating Units 10/10/09
Susquehanna River Basin Commission: Amendments to Project Review Regulations 10/10/09
In-State Production Levels and Infrastructure Sufficient to Trigger 2% Biodiesel Content in Diesel Fuel Sold for On-Road Use 10/10/09
Air Quality Fee Schedule 10/17/09
Outdoor Wood-Fired Boilers 10/17/09
Proposed Revisions to General NPDES Permit for Discharges from Hydrostatic Testing of Tanks and Pipelines (PAG-10) 10/17/09
Oil and Gas Wells 10/24/09
Beneficial Use of Coal Ash 11/7/09
Wastewater Treatment Requirements: The proposed amendments include the elimination of a redundant provision, the recognition of applicable TMDL requirements, and the establishment of new effluent standards for new sources of wastewaters containing high Total Dissolved Solids (TDS) concentrations. 11/7/09
Certified Emission Reduction Credits in Pennsylvania ERC Registry 11/14/09
Safe Drinking Water; (Groundwater Rule; Long-Term 2 Enhanced Surface Water Treatment Rule; and Stage 2 Disinfectants and Disinfection Byproducts Rule 12/26/09
Proposed Revision to Pennsylvania's State Implementation Plan; Fine Particulate Matter "Infrastructure" Requirements 12/26/09
Notice of Comments Issued: Environmental Quality Board Erosion and Sediment Control and Stormwater Management 39 pA.B. 5131 (August 29, 2009) 12/30/09
Large Appliance and Metal Furniture Surface Coating Processes 1/16/10
TECHNICAL GUIDANCE DOCUMENTS
Draft: Riparian Forest Buffer Guidance 9/26/09
Draft: Erosion and Sediment Control Best Practices Management (BMP) Manual 10/17/09
Draft: Underground Mining – Delineating Protection Zones for Public Water Supplies 10/24/09
Minor Revision: Guidelines for Submitting Oil and Gas Well Bonds 1/16/10
Final: Accident Reporting Requirements; Underground Bituminous Coal Mine Sites 9/5/09
Final: Policy for Determining When Loss of Positive Pressure Situations in the Distribution System Require One-Hour Reporting to the Department and Issuing Tier 1 Public Notification: Pennsylvania Safe Drinking Water Regulations 10/3/09
Final: Waste Derived Liquid Fuels (WDLF) 10/17/09
Final: Guidelines for the Development and Implementation of County Municipal Waste Management Plan Revisions 1/2/10

FEDERAL REGISTER NOTICES

http://www.epagov/homepage/fedrgstr

Environmental Protection Agency Control of Emissions From New Marine Compression-Ignition Engines At or Above 30 Liters Per Cylinder; Proposed Rule
(Federal Register – 8/28/09)

Coast Guard Nontank Vessel Response Plans and Other Vessel Response Plan Requirements; Notice of Proposed Rulemaking
(Federal Register – 8/31/09)

Coast Guard Vessel and Facility Response Plans for Oil: 2003 Removal Equipment Requirements and Alternative Technology Revisions; Final Rule
(Federal Register – 8/31/09)

Environmental Protection Agency Elemental Mercury Used in Flow Meter, Natural Gas Manometers, and Pyrometers; Proposed Significant New Use Rule; Proposed Rule
(Federal Register – 9/11/09)

Federal Highway Administration Procedures for Abatement of Highway Traffic Noise and Construction Noise; Notice of Proposed Rulemaking
(Federal Register – 9/17/09)

Coast Guard Pollution Prevention Equipment; Final Rule
(Federal Register – 10/13/09)

Mine Safety and Health Administration Respirable Coal Mine Dust: Continuous Personal Dust Monitor (CPDM); Request for Information
(Federal Register – 10/14/09)

Environmental Protection Agency National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources; Final Rule
(Federal Register – 10/29/09)

Environmental Protection Agency National Emission Standards for Hazardous Air Pollutants for Area Sources: Asphalt Processing and Asphalt Roofing Manufacturing; Final Rule
(Federal Register – 12/2/09)

Environmental Protection Agency National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Paints and Allied Products Manufacturing; Final Rule
(Federal Register – 12/3/09)

Environmental Protection Agency National Emission Standards for Hazardous Air Pollutants; Area Source Standards for Prepared Feeds Manufacturing; Final Rule
(Federal Register – 1/5/10)

Environmental Protection Agency Approval and Promulgation of Air Quality Implementation Plans; Maryland; 2002 Base Year Emission Inventory, Reasonably Further Progress Plan, Contingency Measures, Reasonably Available Control Measures, and Transportation Conformity Budgets for the Philadelphia 1997 8-Hour Moderate Ozone Nonattainment Area; Proposed Rule
(Federal Register – 1/7/10)

Pipeline and Hazardous Materials PHMSA, is proposing to amend requirements in the Hazardous Materials Regulations (HRM) on the transportation of lithium cells and batteries, including lithium cells and batteries packed with of contained in equipment.; Notice of Proposed Rulemaking
(Federal Register – 1/11/10)

DEADLINES FOR SPCC COMPLIANCE

By Lawrence W. Bily, CHMM

Beginning in 2002, the Environmental Protection Agency (EPA) promulgated amendments to the regulations for Spill Prevention Control and Countermeasure (SPCC) Plans. Under the EPA's Oil Pollution Prevention regulations, facilities that store more than 1,320 gallons of oil or certain other polluting liquids aboveground, or more than 42,000 gallons underground, are required to prepare and implement SPCC Plans.

Before those amendments could go into effect, however, EPA proposed changes and/or additions to SPCC Plan regulations in response to comments from the regulated community, then postponed the date the regulations would go into effect. This pattern of promulgate, set effective date, but then postpone, was unfortunately repeated several times.

Following a closer look at proposed and promulgated amendments by EPA's new Administrator and staff, there now appears to be a final set of effective dates for SPCC regulation amendments.

JANUARY 14, 2010

Certain amendments were promulgated in November 2009; only these amendments became effective on January 14, 2010. Please go to the following website to learn more about these recent amendments – www.rtenv.com/archives/emails/dec29.pdf

NOVEMBER 10, 2010

• Facilities that were in operation on or before August 16, 2002 must maintain their existing SPCC Plan, including any November 2009 required amendments. They must then update their SPCC Plan with all other amendments to SPCC Regulations that were promulgated since August 16, 2002 and implement that SPCC Plan no later than November 10, 2010.

• Facilities that began operation after August 16, 2002 through November 10, 2010 must prepare and implement their SPCC Plan no later than November 10, 2010.

RT will publish further information on SPCC Plans before the November 10, 2010 deadline. Until then the following website will be helpful in answering frequently asked questions (FAQs): http://emergencymanagement.custhelp.com/cgi-bin/emergencymanagement.cfg/php/enduser/ std_alp.php?p_sid=ol55CpRj The entire realm of information on Spill Prevention, Control and Countermeasure Plans can be reached at the following website: www.epa.gov/emergencies/content/spcc/index.htm

In the next RT Review, I will discuss the PA DEP Pollution, Prevention and Contingency (PPC) Plan, and how it relates to SPCC Plans.

KEY HIGHLIGHTS

PA UPDATES

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- Stormwater and E & S Revisions, pg. 17

TECHNOLOGY UPDATES

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FEDERAL UPDATES

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